



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

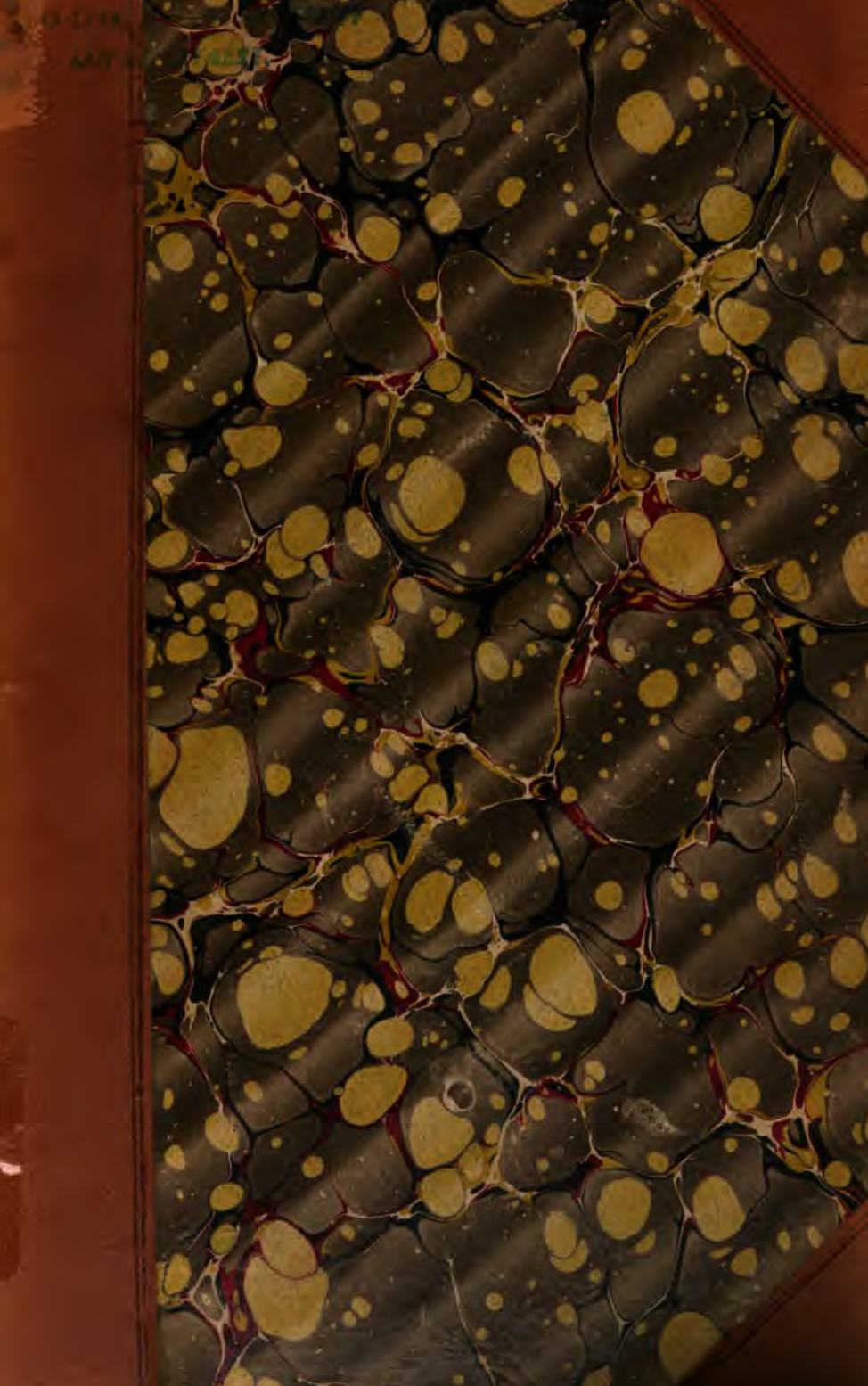
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

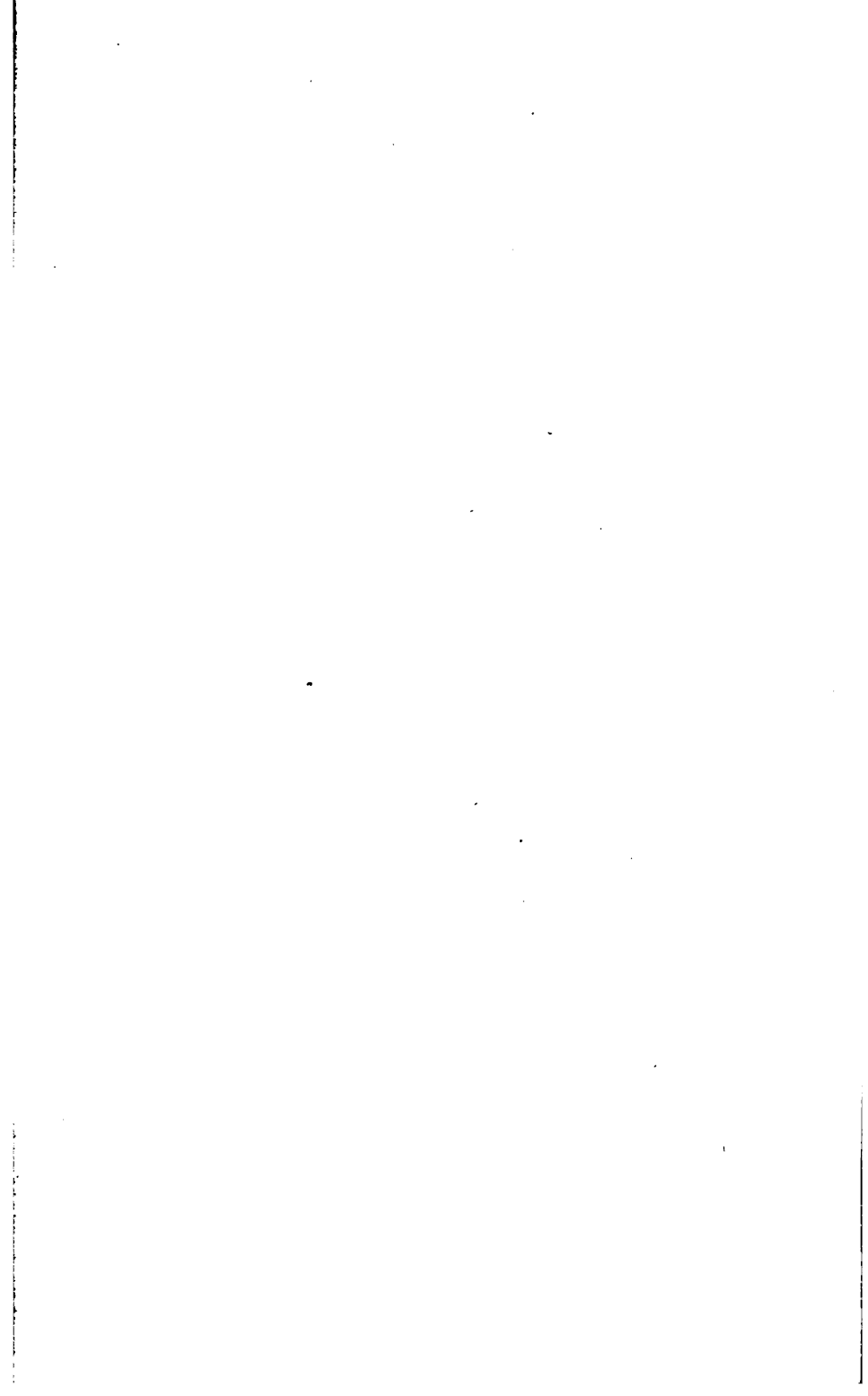
About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



St. John's
(1871)





THE LAW REVIEW.

VOL. VI

LONDON :
SPOTTISWOODE and SHAW,
New-street-Square.

THE
LAW REVIEW,

AND

Quarterly Journal

OF

BRITISH AND FOREIGN JURISPRUDENCE.

VOL. VI.

MAY, 1847. — AUGUST, 1847.

LONDON:
V. & R. STEVENS, & G. S. NORTON,
BELL YARD, LINCOLN'S INN, AND 194. FLEET STREET.
1847.

LIBRARY OF THE
LELAND STANFORD, JR., UNIVERSITY
LAW DEPARTMENT

59,209

CONTENTS OF No. XI.

	Page
ART. I.—TRANSPORTATION.—SECONDARY PUNISHMENT.	
1. Letter to Lord Lyndhurst from Lord Brougham on Criminal Law Reform, 1847.	
2. Correspondence on the Subject of Convict Discipline and Transportation. Presented to Parliament, by order of Her Majesty. February and April, 1847	1
ART. II.—THE LAW OF ESTATES—CHAPTER V. ESTATES BY THE CURTESY, AND AFTER POSSIBILITY OF ISSUE EX-TINCT	
- - - - -	33
ART. III.—RECOLLECTIONS OF A DECEASED WELSH JUDGE.	
No. VI. - - - - -	46
ART. IV.—WRITERS ON THE CONFLICT OF LAWS, OR PRIVATE INTERNATIONAL LAW. Part II.	
- - - - -	56
ART. V.—THE NEW PILGRIM'S PROGRESS. Chap. II.	
- - - - -	74
ART. VI.—DUNNING	
- - - - -	83
ART. VII.—ON MARRIAGE WITH A DECEASED WIFE'S SISTER.	
- - - - -	99
ART. VIII.—CHANCERY REFORM.—THE MASTERS' OFFICE.	
Facts and Suggestions respecting the Masters' Office.	
By N. W. Senior, Esq. 1841. - - - - -	122
ART. IX.—JUDICIAL ABUSES IN FRANCE	
- - - - -	143
ART. X.—ARREST ON MESNE PROCESS.	
1. Report of the Committee made to Merchants and Traders at a Public Meeting held at the London Tavern, 23d February, 1847.	149
ART. XI.—THE NEW REAL PROPERTY COMMISSION	
- - - - -	163

	Page
ART. XII.—NEW COUNTY COURTS' ACT	168
PROCEEDINGS OF THE SOCIETY FOR PROMOTING THE AMEND- MENT OF THE LAW	181
SELECTION OF ADJUDGED POINTS:	
I.—POINTS IN COMMON LAW	185
II.—POINTS IN EQUITY	194
III.—POINTS IN THE LAW OF PROPERTY	207
NOTE TO ART. I.	
Opinions of Mr. Barons Parke and Alderson, and Mr. Justice Patteson, on Secondary Punishment	216
POSTSCRIPT	219

CONTENTS OF No. XII.

	Page
ART. I.—LEGAL EDUCATION - - -	225
ART. II.—RECOLLECTIONS OF A DECEASED WELSH JUDGE.	
No. VII. - - - -	243
ART. III.—THE LAW OF ESTATES—CHAPTER VI. ESTATES	
FOR YEARS - - - -	249
ART. IV.—ON THE ADMINISTRATION OF OATHS IN COURTS	
OF JUSTICE - - - -	265
ART. V.—EXPERIENCES OF A GAOL CHAPLAIN.	
Experiences of a Gaol Chaplain; comprising Recollections of Ministerial Intercourse with Criminals of various Classes, with their Confessions. 3 vols. 1847 - - - -	282
ART. VI.—THE NEW PILGRIM'S PROGRESS—Chap. III.	293
ART. VII.—REPORTS and PAPERS OF THE SOCIETY FOR PROMOTING THE AMENDMENT OF THE LAW.	
Committee on Colonial and Navigation Laws -	300
Colonial Judgeships - -	300
Committee on Equity - -	308
Report on the Masters' Office -	308
Paper on the Jurisdiction of Masters -	315
Note on American Chancery Reforms -	333
ART. VIII.—THE LAW OF SETTLEMENT.	
The Minutes of Evidence taken before the Select Committee of the House of Commons appointed to inquire into the Operation of the Law of Settlement and Poor Removal in March, 1847 - -	335
ART. IX.—MR. O'CONNELL - .	370

	Page
ART. X.—CONTROVERTED ELECTIONS.	
7 & 8 Vict. c. 103. An Act to Amend the Law for the Trial of Controverted Elections of Members to serve in Parliament - - - - -	376
ART. XI.—FRENCH JUDICIAL PROCEEDINGS - - -	389
ART. XII.—GRIEVANCES OF SOLICITORS - - -	392
PROCEEDINGS OF THE SOCIETY FOR PROMOTING THE AMEND- MENT OF THE LAW - - - - -	404
Fourth Annual Address of the Council - - -	404
Proceedings - - - - -	410
Resolutions at Public Meeting - - -	414
SELECTION OF ADJUDGED POINTS.	
I.—POINTS IN COMMON LAW - - - - -	417
II.—POINTS IN EQUITY - - - - -	430
III.—POINTS IN THE LAW OF PROPERTY - - -	441
IV.—POINTS IN BANKRUPTCY - - - - -	442
POSTSCRIPT - - - - -	445

THE
LAW REVIEW.

ART. I.—TRANSPORTATION.—SECONDARY
PUNISHMENT.

1. *Letter to Lord Lyndhurst from Lord Brougham on Criminal Law Reform.* Second Edition. Ridgway. 1847.
2. *Correspondence on the Subject of Convict Discipline and Transportation. Presented to Parliament, by order of Her Majesty. February and April, 1847.*

THE most important of all the subjects which can exercise the mind of the legislature has lately been brought under its consideration—the state of the Criminal Law. The Government has brought forward two bills, of no moment, to give powers of dealing with prisons and prisoners—bills of course, and which neither admitted nor required discussion. But in doing so they took the opportunity of explaining their views and announcing their intentions with respect to the execution of sentences inflicting secondary punishment; that is, of all the sentences pronounced, excepting those awarding the one or two capital punishments which alone are now inflicted during the year in the greatly amended state of our penal code.

The sum and substance of this declaration, as given by Sir George Grey, the Home Secretary, in his letter, and by Lord Grey, the Colonial Secretary, in his speech, is, that transportation shall cease to be a punishment in all cases whatever; that in its place shall be substituted the confinement of the offender for a long period, 12, 18, 24, and even

36 months or more; that pains shall be bestowed on his reformation by prison discipline; that he shall then be employed to labour on public works, either at Gibraltar, or at Bermuda, or at home; that those who are found sufficiently reformed by this discipline shall be carried to Australia, there to be set free, and go whither they please, in the colony or elsewhere, even to Europe, though not to England: and that for other cases the punishment shall be provided of mere banishment (after reformation) out of Great Britain, with leave to go any where, but not to return home before the expiration of the given period.

With every respect and kindness towards the Government, we must be permitted to state some objections to this course of proceeding. The first which at once arises is its nature, being not only unconstitutional but illegal, and eminently inexpedient, were it both legal and constitutional. The power of altering the law being vested exclusively in Parliament, the power of executing the law never can belong to the Crown, unless in so far as its exercise shall consist in executing the sentences pronounced; and never can be so exercised by the Crown so as to alter those sentences.

If the legislature has said that a given offence shall be punished by transportation, surely no one can possibly contend that the Crown can refuse to transport, saying, We disapprove of that punishment, and prefer another. Again, if the legislature says, "transport," and the judge administering that law sentences to transportation, no one can pretend to believe that the Crown acts either constitutionally or legally if, instead of executing the sentence so pronounced, it inflicts any other punishment whatever. Furthermore, if the law gives the option to transport or to imprison, and the judge, exercising the discretion thus vested in him, sentences to transportation, the executive government, in which no such discretion is vested, cannot legally imprison. No doubt there must be a certain imprisonment until the means of transporting are afforded; but inflicting this is only doing what the law directs; it is doing that which is ancillary to transportation. Equally clear is it that the Crown can remit this sentence, like every other sentence, either in whole or in part; but the use of the pardoning power is grossly abused if it be exercised by wholesale, and not on considering

the merits and the circumstances of individual cases. And it is an evasion of the law, and an abuse of the high prerogative of mercy, to alter the law, or refuse to execute it, under colour and under pretence of exercising the sacred functions of mercy.

This was attempted to be defended, or rather extenuated, by referring to an act passed in 1824 (5 Geo. 4. c. 83. s. 10.), which allows criminals under sentence of transportation to be imprisoned "until they shall be sent abroad, or until they shall be entitled to their liberty." It was said, that this meant until the sentence expired, because it was contended that such is the only way in which any convict can be entitled to his liberty. The contrary was shown, demonstratively, to be the meaning of the words; they plainly referred to such cases as pardon, or suspension of sentence in consequence of accident, as gaol fever, or destruction of the prison; and this appeared the more clear, because the former acts, of which the statute in question was only a renewal, as 24 Geo. 3. c. 56. and 56 Geo. 3. c. 27. s. 9. expressly contained the words "until the sentence shall expire, or the convict shall otherwise be entitled to his liberty," which change, by omitting these words, (until expiration of sentence), showed a change of will in the legislature, and also showed that the convict might be entitled to his liberty otherwise than by the sentence being fully executed, contrary to the argument on the construction of 5 Geo. 4.

But one consideration removes all possible doubt from this question. When an option is given to transport or imprison, the words always are, "imprison for a period not exceeding so many years." The judge then, if he pleases to imprison, is confined to the period assigned; if he adds one day, it is Error, and no punishment whatever can be inflicted. Can then the Crown, to which no power, no option whatever is given, no province assigned, except that of carrying the law into effect,—can the Crown imprison ten or fourteen years when the law forbids imprisonment beyond two or three, or whatever time is fixed? Nothing can be clearer than this. The law says, if you transport, give no more than fourteen years: if you imprison, give no more than two. The Crown breaks, and does not execute the law, if it imprisons for more than

two, and yet the Government plan is, and the Government construction of the act is, — give as many years of prison, as the judge has given of transportation, contrary to the express letter and plain spirit of the law. No man can suppose, that without the very plainest enactment, the most precise and clear words, some hundred acts of parliament could indirectly be repealed, namely, all those acts awarding imprisonment, and limiting the period of it to a certain number of years.

It must, however, be further objected, that were the course pursued as legal as it is manifestly against law, nothing could possibly be more contrary to the Constitution than this interference of the Crown with the law unknown to the Parliament — this effectual repeal of the law by the mode and manner of executing, or rather pretending to execute it. All changes of this sort are to be effected with the sanction and advice of the whole Parliament, and not by one branch alone of that body.

But if there were no constitutional objection, the inexpediency of the course pursued is self evident. It sins against every rule; it is a violation of all the principles which should guide the conduct of penal legislation; it defeats the main objects of punishment; it runs counter to the end which all lawgivers have in view, or profess to aim at, as completely as any mode of punishing can be conceived to do. The great duty of the lawgiver is to promulgate his commands, and to denounce certain known penalties against disobedience. The strict right of the subject is to know what the risk is which he runs by disobeying. Can any thing be more obvious than that the statute book is the place, and the only place where the subject must look, where the judge must look, to know what the lawgiver has said? Can any thing be more monstrous than the proposition that the law may say one thing and mean another, or the law say one thing, and the judge one thing, and the minister may give a totally different meaning both to the law and the sentence? Can any thing more tend to make all law uncertain, unknown, despised? Can any thing more confound together different things under one name? Can any thing more bring the whole law into doubt and its commands into contempt,

more make its provisions of uncertain execution — more involve the subject in difficulty — more multiply the chances of his disobedience — more diminish his fear of unlawful acting? The law says transport — the judge says transport — and all the while it is told to the world that transport means not transport — but imprison. As well might the law say, imprison, and the judge say imprison, and all this mean, not imprison, but transport.

There can, then, be but one opinion on the course taken by the government in shunning legislation and trusting to administration — in shrinking from parliamentary rule, and relying upon prerogative. It is really an inroad on the Constitution; an attempt to legislate without parliamentary sanction; and if the scheme is of any real value, its shipwreck is not only risked, but insured by this manner of propounding it. While we say this, we verily believe it arises from inadvertency, and not intention.

We may now, in the *second* place, examine the merits of the scheme; and here we must begin by observing that much of it is quite familiar to all inquirers into Criminal Law, certainly all who have examined the subject of secondary punishment. It is now above ten years since a Committee of the House of Commons reported against transportation as a punishment, at least against the whole executory administration of our penal colonies. Many improvements have since been introduced into the system; but much yet remains to be done in order to amend and to purify it. Nor will any one who still holds by transportation as a punishment refuse to admit that it can only be rendered tolerable by great alteration in the management of our penal settlements.

There is, however, we may observe in the *third* place, a wide difference between this position and the sweeping condemnation pronounced by the government upon all transportation. Lord Grey stated that it was to be entirely abandoned; Lord Brougham, though professing himself generally disposed to concur in greatly restraining it, yet considered it as quite necessary to be retained in certain cases, such as those of convicts in a superior rank, and also receivers of stolen goods. Lord Stanley went further in favour of its retention; and Lord Denman avowed that "he heard of the

government plan with dismay," adding that he, in this declaration, spoke the sentiments of all the judges. None of the other law lords, not even the Chancellor or Lord Campbell, said a word in favour of their colleague's plan. Surely it is quite enough to make us pause on such a subject, one of the highest moment, when we find it is not supported by any person practically acquainted with the administration of the law, and when all the law authorities are either adverse or silent, and among the adverse are all the criminal judges of the land. Let us, then, consider shortly the subject of transportation.

All must at once admit that this punishment is exposed to grave objections. It is very expensive to the country. It is extremely unequal in its operation; being very severe to one class, while on another it presses with but a light weight. Indeed, to one class of convicts it is a punishment of a nature quite different from that which it has in the case of others, being exile, or rather deportation for life to the aged or the poor, while to the young and those possessing or acquiring a little property, it is only of temporary endurance. It is also very well adapted to certain offences, while to others it has but little appropriate application. Moreover, it has not of necessity any reformatory tendency. Yet one great end of punishment is to reform the offender. These great inequalities must be allowed to present serious objections, at least to the infliction of this punishment as a general penalty; and it is probably with a view to such objections that an option is always given in penal statutes to inflict either transportation or imprisonment.

It, however, by no means follows that those objections are sufficient to justify an entire abolition of this punishment. On the contrary, they would all be removed, and transportation be rendered nearly as equal and as unexceptionable as any other punishment, by limiting the infliction of it to certain cases. If we provide that it shall only be inflicted on the classes which especially dread it, we at once remove its inequality, provided we give an option to the judge of inflicting imprisonment in its stead whenever the convict is either so old or so poor that the expiration of his sentence and his life are synonymous. It must further be observed, that the great diminution of numbers sent to the penal settlements

would also remove the great difficulties hitherto felt in conducting those places of punishment. The expense, both of transporting and maintaining and governing convicts, is diminished in exact proportion as we diminish the number transported. The frightful evils of a very unequal proportion between the sexes are entirely removed if only a few men are sent to the colony — there being always a certain number of female convicts who can be then advantageously disposed of, as they dread the punishment most of all.

The question, therefore, is reduced within a very narrow compass. It being manifest that the arguments against transportation are its being peculiarly unequal in its pressure, its being very costly, and its leading to extraordinary and frightful immorality, we reduce it to the level of other secondary punishments, by confining it to a small number of cases; and we thereby gain the additional advantage of making it more dreaded as it is rarely inflicted. There remains only the question, if it really be one, whether or not this punishment is an object of terror to offenders, or persons disposed to offend. But no man in his senses can possibly doubt, nor can any honest man affect to doubt, that transportation has great terrors for some offenders, and, indeed, considerable terror for all, though it is plainly to be wisely avoided in some cases. The being torn from his country — separated suddenly from his family, friends, associates — removed violently from all the habits and pursuits of his former life, undergoing a painful voyage of many months — placed in slavery, and condemned to labour for years under close restraint — treated at once as a malefactor and a slave — is evidently a great suffering to all who have held any respectable station at home — a suffering only second to death. Accordingly it is reported, and we believe the statement, that all the evidence taken by the Committee appointed to inquire into the subject agrees in so representing it. Judges, gaolers, gaol chaplains, counsel, police-magistrates — all agree in so reporting. One or two, deeply impressed with favour towards the government scheme, at first described a reformatory confinement, followed by exile to the penal colony, and there obtaining freedom, as a sufficient substitute. But on being pressed, all of them, without any one

exception, admitted that some cases could only be well treated by transportation, and not one of them would say that the punishment should be entirely given up.

The being employed on public works, after the reformatory confinement, is part of the plan. But against this there are many reasons from principle and much authority of persons examined. The exposure of the convict to the public gaze has the inevitable effect of making him shameless and callous; it prevents the possibility of reformation being effected; it is hardly of any use in any stage, but absolutely cruel in the second, that is, after the reforming process has been successful. It may, indeed, increase the terrors of the punishment, but then it prevents the reformation proceeding it if used at first, and undoes that process if afterwards applied. On this point all the witnesses examined are said to have been unanimous, and it must be regarded as given up, or at least confined within its present limits. But indeed these limits should be reduced; or rather, no convict labour ought, even now, to be used in the mother country. This is, from the evidence, one of the clearest propositions in criminal police, and the adoption of it ought to be immediate and general.

The substitution of exile, or expatriation, as it was called by Lord Grey, for transportation is twofold. Convicts supposed to be reformed by imprisonment, or by imprisonment and labour on public works combined, are to be sent out as settlers, not as criminals, to the colonies, and there to be set free, with liberty to act as they please, and even to remove whither they please, only not to come home. They may go to India, or Boulogne, or Florence, or Paris — not to England. The letter of Sir George Grey proposes exile as a punishment at once, after the old and exploded system of Scotland. Convicts are to be banished; that is, sentenced to remove themselves from England, or to be shipped by the government to some port on the continent. Both of these plans are absurd; they are indeed ridiculous.

As for the first, it is only adding to severe punishment, or punishment intended to be severe, a penalty, intended to be so light, that in many cases it will be no punishment at all, and in some, a positive advantage, or premium for crime. We have hundreds of emigrants to Australia every year, who

pay for their passage. We have thousands more who are only prevented from going thither by wanting the means of transporting themselves. And a vast proportion of these persons are of the very class, in point of station and means, to which convicts belong. Then mark the absurdity of inflicting as a punishment on the criminal, that which is a boon anxiously desired by the innocent ! Again, it is said—Lord Grey actually said—that it would be easy to send the convicts who had undergone the reformatory imprisonment, and the hard labour process, as if they were free emigrants, and to carry them, though at the government expense, in the same vessels in which free emigrants embark themselves for the colony. What ! Ship a score or two of convicts just released from forced labour, in convicts' dress on our hulks, (for in the plan the hulks are retained, while transportation is abolished,) and flatter yourselves that they will be suffered to mix with the families of honest men who never saw the inside of a prison ! How many hours would elapse before these convicts were left to themselves and shunned by the other passengers as if they had the plague ? Their embarkation is compulsory ; they cannot land after once being on board. Then how conceal this restraint when the acquaintance they have made during the first two or three days should lead to a proposal of stepping on shore at the Nore, or at Portsmouth, or while wind-bound at Falmouth ? But is the shipper to conceal from his honest passengers the fact of his having mingled them with convicts ? And if he does, is the government to pay the damages which would be recovered in an action on the case for the fraud thus committed ? We feel that it would be unmerciful to dwell any longer on this portion of the plan.

As for the scheme of banishment, without compulsory deportation, it seems quite enough to state that the project is utterly impossible of execution. What security can you have that the convict will go abroad ? If you carry him by force, what security that he will not return the day after you land him ? But also, what possible right have you to send your malefactors to France, or Germany, or Holland ? Will their ambassadors give you passports for them ? Will not their governments remonstrate, and may they not re-

taliate? Fancy a cargo of felons (as Lord Brougham put it) attempting to land at Calais or Boulogne! Then what if the captain were to say,—“True, they were malefactors, but our new scheme of prison discipline has reformed them; they are now worthy folks.”—“Oh,” the mayor would make answer, “we have quite as many of these worthy folks on our works, and more than we well know what to do with. So, an’ it please you, carry the worthies elsewhere.”

It seems to be unknown among the authors of this scheme that Scotland once used to banish her felons—and even each county banished its malefactors from that to the adjoining provinces. So barbarous a punishment could not continue to deform the jurisprudence of a civilised state. Accordingly, some seventeen years ago, it was abrogated, having nearly fallen into disuse, for all the writers of Scottish law treat it as the relique of a barbarous age, only fit for the infancy of legislation (Alison, 669., Sir G. Mackenzie’s *Law of Scotland in Criminal Matters*, 25. 27.). England once, and only once adopted this punishment, and that for political offences, by one of the famous Six Acts; but in no one instance was it ever inflicted, and it has long been repealed (11 Geo. 4. c. 37.).

Such is the government plan for amending the criminal law by the Royal Prerogative, without any sanction from the Parliament. It is wholly unconstitutional; it is, if acted upon, utterly illegal, being an infraction of the positive statute law of the land; it is grounded upon unsound principles; it is the result of narrow views; it is reprobated by all the Judges of the United Kingdom; it is censured by all the inferior Magistrates whose opinion is of any value, or can carry any weight; it is exceptionable in all its attempts, all its effects, all it leaves unprovided for. There is but one solitary merit in the scheme; it recognises the duty and declares the expediency of requiring measures of reformation as an essential branch of all penal dispensations. This is a great merit; and its being the solitary recommendation of the plan must not prevent us from amply acknowledging its value and freely lauding it.

There can be no doubt whatever that the reforming of criminals after conviction, and before restoring them to society, is one great object of criminal jurisprudence, and

one great branch of the ruler and lawgiver's duty. It is equally an object of punishment, and equally a branch of duty with the other end of deterring by example. But for the exemplary and the reforming tendency of penal infliction, there would plainly be no justification of punishment at all; it would be an evil added by criminal law to the evils produced by criminal acts — a mischief inflicted on society by the law-maker in addition to that inflicted by the law-breaker. This is always freely admitted. But it is further true (and this is often lost sight of, and sometimes denied), that the reformatory tendency is much more certainly operative than the exemplary tendency; that we can more surely, by wise precautions, reform the convict, than we can, by the example of his punishment, deter others from wrongdoing.

On this point we go the whole length of Lord Brougham's doctrine, as delivered both in the late debates and in his letter to Lord Lyndhurst; we consider the deterring effects of all punishment as very much less to be relied on than the bulk of mankind and all lawgivers have supposed. In other doctrines of his Lordship, as his objections to transportation, we do not entirely agree¹; for we think that he would confine the use of it, as a punishment, within too narrow limits; and here again we have the authority of the Judges on our side. But we entirely agree in the view which he takes of the deterring effect of all punishment; and we cannot do better than express our own views of this most important subject in his Lordship's language, taken from his recent publication: —

“Truly, the importance of this matter it would be difficult to overrate. It concerns neither more nor less than the peace, the morals, nay, the very existence of society, threatened as it is by the frightful progress of crime, while the inefficacy of the means that the laws afford for restraining evildoers becomes every day more deplorably manifest. Let us calmly consider this subject, and then ask whether the known facts, the result of our past experience, do not warrant a grave suspicion that all our efforts to prevent the commission of crimes have hitherto been made in a wrong direction ?

¹ We are glad to find that his Lordship has himself qualified them in a post-script to a second edition of his pamphlet.

"I begin with the startling fact that, having conferred both with my brethren at the bar, with experienced judges, with experienced magistrates exercising the functions of police, with secretaries of state, the heads of the police department, I have uniformly found their opinion to be unfavourable, when asked if punishment had any great and steady effect in deterring offenders from following the example of the punished parties ?

"Next, I observe that the dread of punishment must always depend upon the certainty of its following the commission of the offence, inasmuch as, while the slightest infliction which should be quite sure speedily to visit the offender, would, in most instances, suffice to deter him, the heaviest would fail to influence him if not believed to be inevitable or expected to be remote, and the degrees of uncertainty and of remoteness being always increased by the party's own imagination, the passion which afforded the temptation would also make him sanguine in his hopes of escape. Now, nothing like certainty and celerity ever can, in the nature of things, be attained in the connection which the law would establish between guilt and punishment. That connection is evidently not a necessary one, and though we may diminish much of its uncertainty, still enough will always remain to flatter the hopes of the guilty-minded, and to weaken the force of the law in restraining him.

"I grant that much has of late years been done to lessen the chances of escape. The mitigation of the severity which once disgraced our criminal code has rendered it much easier to find prosecutors, witnesses, and jurors, who may be disposed to put the penal laws in execution. The amendments in the rules of pleading and of evidence have diminished the chances of guilt escaping. The greater frequency of trials has shortened the interval between apprehension and punishment. The improvement of the police in great towns has established a more vigilant superintendence of wrongdoers. The better selection of magistrates has amended the administration of the criminal law, and especially of the police or preparatory process. But even if these reforms, with the others still wanted of a public prosecutor and stipendiary justices, should make our criminal code as efficacious as any human laws can be, and render the magistrate as far as is possible a terror to evil-doers, there is still an obstacle that never can be removed to the complete success of a system which rests upon terror alone as the means of repressing crime ; still, men's passions, their base propensities, their vile speculations will be fortified by the hope of escape ; and even if the certainty of punishment were made far greater than it ever can be rendered by any improvements in that

system, all would be in vain, and for this plain reason, that men, while considering whether or not they shall break the law, are not in a calm and calculating mood; they are under the influence of passions, or of feelings, or of wishes and hopes, which silence the voice of reason as well as of conscience, making them alive only to the prospect of gratification and to the hopes of impunity."

We next wholly coincide in the views which his Lordship takes of the error committed by considering crimes as insulated, as originating in occasional gusts of passion, or other temptations, and all criminals as of the same nature — so that all examples are addressed as if to the same minds; whereas most offences spring from bad habits, and gross ignorance, and even the graver ones are only committed after a course of less serious faults. From thence it follows that the deterring effect of punishment is much weakened, because the example is addressed to minds already perverted by evil habits, and the offender is to be reclaimed from habits already formed. This argument is very conclusively urged to show that the habit of connecting crimes with suffering, the only deterring operation of the law, is greatly weakened in its preventive influence by the evil habit with which it has to contend. Thus the balance is cast in favour of wrongdoing by the passion or other bad motive of the moment; and most crimes are committed, not in cold blood, when the mind is in a calculating mood, but under the influence of excitement, when the reason is asleep.

These principles are further illustrated by comparing the trade which offenders drive with other trades or occupations that are pernicious and even hurtful to life: —

"I fear we may upon the whole regard the criminals who infest society as being a kind of class, who have turned crime into a trade or calling, and no improvements in the administration of criminal justice have yet been able to put down the business, or even to prevent those who follow it from being a very numerous body.

"Now, when it is considered how many offences a thief must commit to earn his daily bread, it becomes quite evident that absolute impunity is the rule, and detection only the rare, and, as it were, accidental exception. It may be assumed without exaggeration that, if one offence in ten was followed by detection, the

class could not exist. That his offences must be numerous to enable a depredator to live may be further proved by considering that his profits are not measured by the losses of his victims but by the miserable pittance allowed him by the receiver; the capitalist, who must be paid, not merely for the ordinary risks of trade, but for the danger of discovery, and for the low price which alone he is able to command in the market.

“But further, were it possible that in time a species of certainty might be attained, so that a course of crime should inevitably lead to punishment, all would not be enough; the offender, in the chains of ignorance and bad habits, would pursue his calling, and look upon the gallows itself at a distance with as much calmness as a soldier regards the slaughter of next year's campaign. Why should we expect the thief to abandon his pursuits, because years to come he will suffer punishment, when the educated man will not forego his bottle, knowing and admitting the inevitable consequences of intemperance? Artisans, who labour in unwholesome manufactures, sell themselves to certain death for a small increase of wages, which excess over the ordinary rate would, in truth, amount only to a little sum for their whole lives. While file-cutters had not the benefit of the blast to disperse the filings with which the air is filled by the dry-grinding, every workman knew for certain that he must die soon after the age of forty. Workers in white lead and brass are still exposed to the imminent risk of palsy, a sentence of death by hunger in their case; yet how small an increase of wages attracts men from wholesome employment to those hurtful trades! But the same persons would probably shrink from exposing themselves to the risk of instant death, although the chances of escape might be in their favour. Hence, even could we attain the point of absolute certainty, a point assuredly that never can be attained, we should still have done little towards repressing crimes unless we could also add celerity to certainty, and ensure to each offender the penal infliction due to his crimes within a very short period of his committing them. Either of these things, it is evident, is most likely never to be accomplished; the accomplishment of both together we may safely pronounce to be wholly impossible.”

There is, however, one argument still more practical and conclusive on this subject. If the seeing or the hearing of punishment, or the knowledge that it has been inflicted on others, has any certain tendency to prevent by its example, surely much more certain must be the actually undergoing

it. Yet mark the case of all, but particularly young offenders. Hardly any one is sentenced to transportation or to long imprisonment, who has not been repeatedly and even severely punished before. Of fourteen cases of juvenile delinquents examined by the Liverpool magistrates, the whole had on an average been punished nine times within seven years — and one or two so much as fifteen times in two years. Boast after this of the penal law! Trust after this to the deterring effect of example! Why, even experience is unable to deter from repeating the crime while yet the offender is smarting under a former punishment.

Such being the hopelessness of preventing crimes by the mere exemplary effect of punishment, surely it behoves us to see if we cannot at least mend the offenders already convicted, and especially those of tender years. The experiment has been made, and it has succeeded. In the neighbourhood of Hamburg, in Mettray, and eleven other towns of France, it has been tried with great success since 1839; and at Stretton on Dunsmore, near Warwick, it has been in operation for eight and twenty years. The criminals are worked in gardens or on farms; they are well instructed; they are carefully superintended — and then they are placed out under kind and judicious masters. The cases of relapse are comparatively of rare occurrence. The expense is greater in France than it ought to be, 18*l.* a year for each, after deducting two pounds, the value of his labour. In Warwickshire it is only 25*l.*, which is much less, after allowance is made for the greater expense of living in England. But the Liverpool magistrates have proved that the expense of trying, maintaining, and preparing for transportation the fourteen boys whose cases were examined, exceeded 100*l.* each, notwithstanding the great economy with which prosecutions are conducted at Liverpool; and this is independent of the heavy charge of transporting those whose crimes and punishments ended in that sentence.

There cannot be any doubt that it is the bounden duty of the government to multiply these reformatory establishments all over the United Kingdom; and in proportion as the heavy expense of transportation is saved, that is, the cost both of sending the convicts abroad and maintaining them in the penal colony, the funds will be afforded for building and

maintaining penitentiaries upon the sound plan of Stretton, Horn, and Mettray, the original institution in France.

But it is fit to inquire why we should confine ourselves to reform convicts. Why we may not rather begin at an earlier stage, and prevent men from offending and being convicted? The sound education of the people is the only true remedy, by prevention; and this means not mere reading, writing, and accounts; such education is of little avail, for the worst offenders generally have had it. But the training required to prevent crimes is of another and a larger kind; it consists in the blessed influence of the infant school, followed by sound moral and religious instruction, the providing good libraries, the association with amiable and respectable teachers. This is the education which alone can have any real tendency to promote virtue and to prevent crimes. It forms, however, no part of the subject which we undertook to discuss in this paper, and we only indicate it in connection with that subject because it is a corollary from the proposition which we have been expounding—that the lawgivers of any state mistake their way when they confine themselves to punishment as the means of deterring offenders, and prepare for themselves the materials of great disappointment when they hope for much benefit from the exemplary operation of the penal system.

Since these pages were written we have had access to the evidence taken before Lord Brougham's Committee on the Execution of the Criminal Law. This inquiry is one of first-rate importance, and it has been conducted with great regularity as well as dispatch; so that the evidence bears closely upon the subject. Many keepers of prisons, many recorders and other magistrates, and prison inspectors, have been examined, and from gaol chaplains very striking testimony has been obtained. To the thirty-four Judges of the whole United Kingdom questions, twenty-seven in number, have been addressed, and we have the answers, with other valuable remarks, of these learned persons given in the Appendix. A body of invaluable information is thus collected together, the result of the actual experience of men engaged in administering and in executing the law.

We shall make some extracts, chiefly as to two points.
1. The abolition of transportation. 2. The reformatory system of punishment. And, 1., *as to the abolition of transportation :*

The Hon. Mr. Law, Recorder of London ;

35. "Do you regard the punishment of transportation as effectual for the repression of offences generally?"—"I think decidedly so. My opinion is very decidedly in favour of it as a punishment to be retained."

36. "Do you consider its benefits as sufficient to counterbalance the obvious evil of its inequality when applied to persons of different habits, characters, and circumstances, especially as regards station in life and property?"—"I think they are sufficient to counterbalance those objections ; and I think that the system of transportation being well managed and pursued, might accommodate itself very considerably to those differences of station, manners, and habits."

37. "Do you consider that it would be safe or expedient to dispense altogether with this punishment, or that it would be more advisable to retain it for certain offences?"—"I think it would be desirable to retain it for certain offences. I think it might be made a most effectual punishment if regulations were adopted for the treatment of offenders upon reaching a foreign shore ; and that the punishment should be regulated according to the offence, and that the prospect should be held out of the party being able at some certain period to re-enter in some way or other society in that country, but not for the purpose of returning."

41. "Do the receivers of stolen goods often come before you for trial, or do they generally escape?"—"They often come before me for trial, but they always have a tremendously good character, from the fact of their being able to pay their way. They are sure to have a number of witnesses to character ; but the juries appear to be generally prepared to do their duty, and to find a verdict of guilty if the case is proved. Persons who belong to the class of receivers have a very great aversion to transportation."

42. "Are they persons of considerable pecuniary means?"—"They are very often persons who keep inferior shops, and they are sometimes persons in very good circumstances. There are two very distinct classes of receivers of stolen goods ; one who do it from motives of gain induced by poverty, just as in ordinary cases of larceny ; others who make considerable profit of it as a trade."

Mr. M. D. Hill, Recorder of Birmingham ;

167. "In your experience, do you find that transportation is viewed with terror by persons who are tried and convicted?"—"I have some difficulty in answering that question, for this reason, that if I were to trust to my own impressions I should say that it is the only punishment short of death which appears to produce terror ; but upon inquiring of gaolers and persons who see the criminal afterwards, they uniformly tell me that the impression of terror, if it be sincere, passes away rapidly, and that they are not permanently very much affected by it. But I am bound to tell your Lordships, that if I were to trust to my own impression I should say that they suffer extremely when the sentence is passed."

324. "Do you think that a system of imprisonment can be devised which will be a sufficient substitute for transportation in all cases?"—"I am not prepared to say that I think it could ; and I am not prepared to give up the punishment of transportation altogether, for instance, in the cases to which I have referred."

Mr. Serjeant Adams, Assistant Judge, Middlesex ;

247. "Do you conceive imprisonment to be a punishment which has terror for the bulk of offenders, or has transportation more terror?"—"I should say, generally speaking, transportation has more terror than imprisonment ; that is, using the word imprisonment as it is now carried out."

262. "Do you think any system of imprisonment would be a sufficient substitute for transportation?"—"I cannot imagine any. I have read the American reports, and it appears to me that their systems of long and solitary punishments are breaking down ; and whatever difficulty may be attendant upon the present system of transportation, which appears to me, I must say, to be capable of great improvement, I do not see how it can be dispensed with."

Reverend John Davis, Ordinary of Newgate ;

356. "Do you regard the punishment of transportation as effectual for deterring offenders?"—"It used to be very much dreaded. It was dreaded from 1843 to the present time very much ; but the effect is quite different now in the prison, by the promulgation of the alteration in the punishment."

357. "What alteration do you refer to?"—"The mention that has been made in parliament of not sending transports out of the

country has had a very important effect upon the criminals of London."

376. "Do you consider that transportation ought, therefore, to be retained for certain offences of a graver cast, and for certain kinds of such offences?"—"I consider, beyond all question, that it ought."

377. "You think that it would not be safe to dispense with it altogether?"—"I think not."

378. "Does that opinion arise from your having communicated with prisoners under sentence of transportation, and prisoners not yet convicted, and observing whether they were terrified?"—"I am satisfied that the fear of transportation has prevailed to a great extent outside the walls of the prison."

379. "You think that during the last few months the fear of transportation for short periods has been very much diminished in consequence of the change which has taken place?"—"Yes, I see that it works very extensively. The fact I have mentioned shows it, that we have had seven transports re-tried during these last sessions."

Mr. Bullock, Judge of the Sheriffs' Court ;

476. "Is transportation, in your opinion, an essential and necessary part of criminal punishment?"—"I think it is."

477. "Do you consider that carrying the sentence of transportation quickly into effect would have the effect of increasing its terrors?"—"I think certainly it would, always allowing time for the correction of possible mistakes."

494. "Do you consider that any punishment by imprisonment would be a sufficient substitute for transportation?"—"I think not."

The Rev. Whitworth Russell, Inspector of Prisons ;

512. "As the result of your observation and experience with respect to prisoners, do you consider transportation as having great terror upon the minds of the prisoners?"—"I believe that transportation has the greatest deterring effect of any punishment. I mean that the sentence of transportation has a more deterring effect than any other sentence."

514. "Is it your opinion, therefore, that transportation, as a punishment, could safely be dispensed with?"—"Not altogether."

728. "Suppose some hundreds of persons to be let out of the reformatory prisons, and to be sent out in the way we are now speaking of to Australia ; do you apprehend it is to be expected that they

could in any considerable numbers get on board the common emigrant ships, so as not to be known by the other emigrants to have come out of prisons?"—"Certainly not. I am certain that it would very soon transpire who they were; and I do not think that those ships would afford the necessary accommodation."

729. "Should not you consider it very far from advisable to mix them up with emigrants?"—"Quite unadvisable; I should desire to keep them a distinct body till they arrive in the colony. And though I am aware of the inconvenience which may arise from their being known to be a distinct class, I think that this would be much less injurious than the other alternative, the endeavour on the part of the embarked convicts to disguise their real character, or to conceal it from the rest of the passengers. This perpetual dissimulation, this constant acting of a lie, would be a fresh entrance upon that systematic course of fraud and deception, out of which it has been the design and endeavour of their previous prison discipline to lead them. It would be not merely hypocrisy upon system, it would be the offer of a premium to hypocrisy, and it would meet with its deserts,—it would fail."

Mr. Rushton, Stipendiary Magistrate at Liverpool;

1626. "Do you think that transportation can safely be dispensed with in the execution of our criminal law?"—"That is a question on which I would speak with great reserve and caution. I am of opinion that if we were ready to enforce other punishments that it might be dispensed with; but I do not think that we are ready for it in England, not because of the moral state of the country, but because of our incapacity of dealing with a number of convicts every year under the system which your Lordships have heard explained by the reverend gentleman who has been last examined. We have no gaols yet ready for it; our gaols are not fit for it. We have no gaols in England ready to confine under the separate system the number of convicts that are every year sentenced to transportation."

1686. "Is it not the duty of every legislature to frame its laws so that the words used shall apply to the subject to which they relate in the ordinary sense of the terms, and that when it enacts the punishment of death it shall be understood that death is to be inflicted?"—"Saving the mercy of the Crown I should think it very desirable in all cases."

1688. "Are you not aware that one of the reasons for all magistrates and judges wishing capital punishment to be altered was, that

a very great deal of ridicule got to be attached to the administration of criminal justice, because when they passed sentence of death upon a prisoner, every body was certain that it was not to be executed ; are you not aware that very ridiculous scenes passed ? ” — “ I am not aware from having witnessed them.”

1689. “ Were you at York when the learned Judge called out to the gaoler, when a woman was falling into hysterics at the sentence of death being pronounced upon her, ‘ Tell her there will not be a hair of her head touched ? ’ ” — “ No, I was not present, but I have heard the story.”

Lieutenant Tracy, Governor of Tothill Fields ;

1794. “ Have you had any opportunity in Bridewell of conversing with many of the prisoners as to their feelings about transportation or other punishments to which they might be subjected ? ” — “ Very many ; and upon those several conversations, obtained with some care, I base the opinions that I have formed.”

1795. “ Do you find that they have generally a great dislike to transportation ? ” — “ Most decidedly. A London thief has manifestly a great horror and dread of transportation.”

2943. “ Do you happen to have heard among them lately whether any observations have been made upon the change in the execution of the law as to transportation ? ” — “ Yes, I have, within a month.”

2944. “ What have you heard ? ” — “ No later than last week, at the Clerkenwell Sessions, where there were upwards of a hundred for trial, I heard them shouting to each other, and we could scarcely suppress the conversation ; it was in their slang terms, ‘ Never mind, Bill ; no more transportation now ; ’ and such like. But I have been repeatedly of late made aware of the feeling by their correspondence with their friends. They are not all aware, neither are their friends for the most part aware, that the correspondence is examined ; and I have read many letters within the last fortnight which have most clearly shown that they are elated at the contemplated change.”

Mr. Cope, Governor of Newgate ;

2424. “ Have you ever had any opportunity in your conversation with prisoners, or from your observation upon them, to ascertain whether they have a great dread of transportation in general ? ” — “ They have a great dread of it.”

2438. “ What class of prisoners do you think have the greatest

dread of transportation?" — "I think that many of those that we have had that have the greatest dread of it are persons that have been transported before, and we have many such."

Captain Williams, Prison Inspector;

2711. "What is your opinion of the punishment of transportation in its effects upon the minds of prisoners?"—"My opinion is, that the only punishment which has been at all dreaded by the criminal population is the sentence of transportation, and particularly upon the agricultural prisoners; not so much, perhaps, upon persons in a close population, but generally upon agricultural people it has considerable effect."

Mr. Chesterton, Governor of the House of Correction at Cold Bath Fields;

2833. "Do those who have been transported dread transportation more than those who have not been transported?"—"They always dread transportation a second time. I can give your Lordships an interesting case which occurred within the last three weeks: a man had been two years in our prison at the age of sixteen or seventeen. He had outgrown our knowledge. He had been in various other prisons in the metropolis; he was sentenced to transportation, and was sent to Bermuda. At the expiration of his sentence he came back to this country, hoping that a brother of his would give him some assistance, in which he was disappointed, and he committed another offence, for which he was sentenced to six months' imprisonment. When he came to our house of correction we did not know him; but just at the termination of the sentence he addressed the chief warder and myself, and informed us that he had returned from transportation, and that he had made up his mind from the sufferings he had undergone, never to transgress the law again. He said, "I have undergone so much suffering during my transportation that I would rather work at any thing for the mere food, without any wages, than again incur the penalty of transportation."

Mr. Charles Pearson, City Solicitor;

2898. "What would be your opinion as to the effect in deterring from crime of a substitution of imprisonment in this country for the present system of transportation?"—"Taking the present system of transportation, and taking the present system of home imprison-

ment, I think transportation would have a greater influence in deterring from crime."

2894. "Do you think that any change could be made in imprisonment which would give to it the same terrors as transportation to a penal colony?"—"I think not, where the state of the punishment in the colonies is understood."

2909. "Supposing a system adopted which would end in persons being what is called 'exiled' abroad, that is, being under no other restriction than that of not returning to the mother country, do you think that that would be a system capable of being practically put into execution? Supposing, for instance, such persons might come to the opposite shore of the Continent, and in fact, wherever they pleased, would it be possible to prevent their actually returning home?"—"As a lawyer, with my notions of banishment or exile, I can scarcely entertain any idea how that is to be accomplished. Practically, I believe it could not be enforced; but I do not see how, in point of fact, it is to be provided for. What is to be a man's status, who is neither a citizen of this country nor a citizen of any other?"

2. As to a Reformatory System of Prison Discipline.

Mr. Serjeant Adams;

105. "You think then that with children it would be better to apply ourselves more to a reformatory process than to a deterring process?"—"I have not the slightest doubt about it. It appears to me that if we look at the history of imprisonment we shall find that it was the punishment of a barbarous age, when terror was the ruling principle, and when moral influence was unheard of. Imprisonment at that time was accompanied with every species of aggravation and cruelty. In dungeons and darkness, and with chains, starvation, and torture. By degrees, as we have become more enlightened, we have established, first, houses of correction, a term unknown to our common law; we have since endeavoured to engraft upon our imprisonment the reformation of offenders; and we now add to imprisonment the education and religious instruction; but the whole system is founded upon the old feudal principle of terror and brute force. I am old enough to remember the condemned cells in Warwick Gaol, where prisoners were thrust after sentence, to drag out the remnant of their earthly existence in darkness and terror. It is doubtless still necessary to hold out

imprisonment as a terror to adults ; but as far as a child is concerned I do believe that prison discipline of any character operates as a retarder rather than a promoter of the reformation of a child. Confinement is needful ; but it should be the confinement of a school, and not of a prison. The mind of the child loses its elasticity and is injured by imprisonment. I am speaking of imprisonment in the common ordinary sense of the use of that word."

123. "In what respects does the system there [at Stretton-upon-Dunsmore] differ from any other?"—"In not making the place a prison ; that is the fundamental difference. It is a sort of common farmhouse. They hire them as yearly servants, so as to give the magistrates jurisdiction over them as servants in husbandry. They give them spade husbandry, &c. If the boys behave well, confidence is placed in them ; they are trusted to carry messages, &c., and thus they gain self-respect. It is, in that respect, like the system lately introduced for the treatment of Lunatics. We find that by cultivating self-respect even in those unfortunate beings we ameliorate the disease, and make them a totally different class of persons."

124. "Have you known instances in which persons who subsequently have been confined in that way have returned to their old habits, and have been tried a second time?"—"If the committee will allow me, I should like to present them with a summary of the results of that asylum for the last thirty years. They have within the last six months published a summary of all their reports, with results, since its establishment. I think I am safe in saying that they have made inquiries afterwards to a very considerable extent, and I think the reformations have exceeded seventy per cent. ; sixty per cent. without a relapse. I had this reprinted for the assistance of the magistrates of Middlesex, who take a great interest in this question, and I will send a copy of it to the committee."

The Reverend Whitworth Russell ;

717. "Suppose a person to have committed one act of embezzlement, after having passed a life of virtue and respectability ; suppose him to have undergone a process of reformatory discipline in a prison ; suppose, also, that person to be let out after that reformatory discipline has been undergone ; should you yourself, aware that he did not know that you were acquainted with his previous history, have sufficient confidence in the reformatory process which had been applied to his case to employ him as the receiver of

your rents?"—"I would. I have a man in my service now, and who has been in my service for years, who was convicted of an embezzlement which, I believe, was a solitary case. In that man I have long placed the most implicit confidence, and I have never had cause to question his integrity during the whole period of his service with me. He was sentenced to transportation, and underwent the reformatory discipline in the general penitentiary."

718. "Was he sent abroad?"—"No. After he had undergone his legal sentence I employed him, and he is now in my service."

719. "How long have you employed him?"—"For ten years. I have great confidence in the effects of a salutary corrective and reformatory discipline, resulting from a long and extensive experience. Almost every opinion I have given to your Lordships has been founded upon extensive experience."

The Reverend John Clay, Gaol Chaplain at Preston;

1244. "You say that you have observed that the first few weeks they seem to you to be very uneasy, and that afterwards that feeling subsides, and they appear to be even happy; does that appear to be the result of their merely becoming habituated to the confinement, or is it any moral change of feeling and principle?"—"I am happy to say that it is the result of a moral and religious change."

1245. "So that in that case you consider a reformatory principle has been at work during the first period of the confinement?"—"Certainly. The returning ease of mind and the reformatory principle come together."

1246. "Does that lead you, therefore, to anticipate that when their period of confinement has expired, they will go out better members of society than they were when they committed the crime which led to their being brought there?"—"I am perfectly satisfied not only that they will go out, but I know that they have gone out, better members of society and better Christians, and have continued so for many months, and in some cases for one or two years."

The Reverend John Field, Gaol Chaplain at Reading;

1421. "When prisoners have been dismissed have you found that they were taken back by their relations?"—"In very many instances they have been taken back by their former employers. I generally, previously to the discharge of a prisoner, write to his

former master, or the clergyman of his parish, requesting him to intercede with the master to give him employment, and I have generally been able to succeed."

1424. "There is less reluctance now to take them back?" —
"Very much less."

1425. "How long has the new system been in operation?" —
"Two years and nine months."

The Reverend W. C. Osborn, Gaol Chaplain at Bath;

1454. "Your opinion then is, that the deterring effect of punishment is generally considered over-rated?" — "Yes."

1455. "You would trust more to the influence of a reformatory and preventive process?" — "Yes."

Mr. Rushton;

1698. "There is a lad in the borough gaol of Liverpool of ten years old. That lad was brought before me when he was nine years old. It was a distressing case. I sent for his mother, and I said, 'Now if this lad were a piece of meat or a shilling you would look after him; you do not look after him at all. He is a thief; you will be answerable if this goes on. I give him up to you; take care that he does not come again.'"

1699. "What station was she in?" — "A poor woman. In a month or so he came back again, charged with a deliberate attempt to pick the pocket of a woman in the market. I sent for the woman again; she cried piteously, and I again let her take him home. In a week he was brought back, having then got his hands into a lady's pocket, and hold of a purse containing 30 $\frac{1}{2}$. This became a serious matter. A magistrate cannot pass over this; the safety of every one is concerned in it; this poor woman's 30 $\frac{1}{2}$ might have been her whole substance. I then sent for the overseer, — we have an industrial parochial school three miles from Liverpool, — and I said, 'Now this is a very clever child, let us try if we cannot manage him.' I sent for the woman, and said that she should not have the child any more; that I would certainly deal with him, and I remanded him, and sent him for two days under remand to the Bridewell, and when her vigilance was abated, I had him taken secretly off to this industrial school. No doubt that was exercising a power beyond the law, but I was anxious to make an effort to save the boy. In three days she found him out, and took him out of the industrial school, and in one week he was

brought back to me, having again attempted to pick the pocket of a woman in the market-place, and he was sentenced by me for that attempt to three months' imprisonment, and he is now in gaol, where proper classification is impossible; and, as his mind is already sufficiently impressed with the practices of his mother, that lad is sure to be a thief unless something is done. This led me to consider who the woman was, and I then instituted accurate inquiries, which I ought perhaps to have done before, about this woman, and I found that she had been a convicted thief, that she had trained this child to the dexterous picking of pockets, and he is one of the most dexterous pickpockets alive."

1700. "How old is he?"—"Ten years old. If we had an institution to which I could have sent that lad on a summary conviction, where he would be under reformatory discipline, and have been subjected to Captain Maconochie's Mark System, or any system that would have tended to insure his progress, he would have turned out a clever and useful man; he will now turn out a clever thief. Now this goes on day by day, under the eyes of every magistrate, though magistrates do not usually see so much of it as we do in large towns; we see it daily. A population of 360,000 persons yields a vast amount of this sort of crime; and the great object which, I think, we ought to attend to is to cut up this cause of crime by the roots, by taking these juvenile offenders and putting them into places like Mettray, or the asylum which has been tried at Stretton-on-Dunsmoor, near Warwick. In that asylum it is shown, even in a financial point of view, the system has very favourable claims to consideration. The fourteen cases in Liverpool cost 100 guineas each. From 1833 to 1841 seventy-seven boys were put into the Warwick Asylum at Stretton-on-Dunsmoor; the cost of the whole, including maintenance, was 1026*l.*: of those seventy-seven boys forty-one have been effectually reformed. So that, if you divide the cost by the number reformed, it will be found that whilst on our system at Liverpool it has cost 100 guineas in each case, and that ten out of fourteen have been transported, it has cost only twenty-five guineas in the asylum, where forty-one out of seventy-seven have been reformed."

Mr. T. Wright, a Visitor of the Salford Prison;

2311. "Are the prisoners at Salford in separate confinement?"—"No, they are not, I am sorry to say; I wish they were."

2312. "What is the usual length of confinement of those for whom you provide places?"—"They have commonly given them

six months in Salford ; some go up to Kirkdale, some to Lancaster ; nine months, twelve months, and two years.

2313. "Did you, in many cases, make your application to the former masters of those poor people?"—"In many instances."

2314. "And did many of them take them back?"—"Many took them back by my being responsible for them ; and I have never lost a farthing, but by one."

2315. "Do you mean to say that you actually incurred the responsibility?"—"Yes ; for instance, I knew lately there was one in Manchester, and I said to him, 'Will you take your old servant back?' He said, 'That is a consideration.' I said, 'You seem to be willing to take him back.' He said, 'I will, if you will lay me twenty pounds down as a security ;' and I said I would do it."

2316. "And you did?"—"And I did ; and about four months after the man had been with him I called in to see how he was going on. He said very well ; and I was at liberty to take back my money."

Captain Williams ;

2732. "Have you any strong opinion upon the possible reformatory effects of punishment by imprisonment and sound discipline and good instruction and treatment, that shall induce them to acquire habits of industry?"—"I have no question that a considerable proportion of prisoners might be reclaimed if you went to the expense of so doing, and if you placed the prisoner in a very much better situation in life than he was in before he committed crime. But I think a great mistake has been made in prisons by attempting two things, reformation and punishment, together. I look upon it that prison discipline ought, in the first degree, to be of a strictly penal application, its great aim being to deter others from the commission of crimes by its severity, at the same time affording the means and opportunity of moral reformation. The discipline of a house of correction is to deter, that of the penitentiary to reform. The two objects cannot be carried on together."

Mr. Charles Pearson ;

2868. "Do you consider that it would be safe to intrust justices of the peace, or magistrates appointed for that express purpose, with the power of summarily convicting such offenders, and punishing them by whipping without sending them to prison?"—

"No. I am of opinion that the increase in the number of summary convictions is a great cause of the increased amount of crime in this country."

2869. "The question supposes the power of summary conviction not to be exercised by the justices of the peace at present filling that office, but by skilful and experienced persons appointed to the exclusion of the present justices?"—"I have no doubt that the commitment of the juvenile offender to a place of refuge, where he would be properly instructed and trained to manual occupation, without stamping upon him the charge of crime, would have a most beneficial effect; but I am quite satisfied that the multiplication of offences which has taken place during the last few years, by which children are brought within the range of the criminal law for small offences, and subjected to short imprisonments, attended as they are with the destruction of character and the prevention of all self-respect, and also the alienation of them from their connections and friends, is, in point of fact, a fruitful source of the enormous increase of crime which the returns show."

2916. "If you would not give to the child an impunity for crime, what would you substitute, either for a summary personal chastisement, or for the system of imprisonment as at present practised?"—"I would establish a reformatory asylum to which that child could be transferred, not as a punishment for crime, but as a restraint upon its actions; and I would fasten upon the parent, or, failing the ability of the parent, upon the parish to which the child belonged, an obligation to pay for the support of that child,—the parent or the parish having failed to perform that duty which God and the law had cast upon them."

The evidence, both from France and elsewhere, of the evil effects produced by the liberation of many convicts yearly, as their terms of imprisonment expire, would seem strongly to inculcate the necessity of both maintaining some penal settlements, to which the worst offenders may be sent, and of greatly improving the management of those imprisoned at home. It appears that in Norway, the capital, Christiania, is so much infected by the proportion of the liberated convicts to the whole population (nearly one in thirty), that the inhabitants have been called upon by the police to provide the means of security for their persons and property. In France, where between 7000 and 8000 convicts are yearly set free, the superintendence of the

police (*surveillance*) and the compulsory residence prescribed are found very inadequate, especially since the invention of railways, to secure the public peace. The residence of the liberated convicts is found to be a permanent danger to society. The system of imprisonment (*reclusion*) and of the *bagnes* or *travaux forcés* is found of little effect in reforming and deterring from a repetition of the offences punished; and the proportion of those recommitted for new offences is not less than 30 per cent. Thus, of about 90,000 persons tried in the whole kingdom, 15,000 were persons who had already suffered imprisonment, or one sixth of the whole number — to say nothing of the corrupting effect produced on the community by those who escape a second apprehension.

Almost all the witnesses and authorities are against giving up capital punishment altogether. But considerable difference of opinion exists on the deterring and exemplary use of penal punishment. It is, however, remarkable that those who have had most intercourse with convicts are they who feel the least sanguine as to this effect of punishment, and who lean the most to making trial of it rather as a means of reformation.

Upon one important point the whole evidence and all the opinions are unanimous — the good that may be hoped from education; meaning thereby the training in infant schools and the communication of knowledge with sound, moral, and religious instruction, to boys and girls more advanced in life. There seems in the opinion of all to be no other means affording even a chance of lessening the number of offenders and diminishing the atrocity of their crimes. Without raising any speculative question upon the right to punish those whom the state has left in ignorance, it may safely be affirmed that the duty of all rulers is both to prevent, as far as may be possible, the necessity of punishing, and when they inflict punishment to attempt reformation.

In the further papers presented on the 15th of April last on the subject of Transportation, we find a Report of some interest by a Select Committee of the Legislative Council

of New South Wales, on the renewal of transportation. The Committee consider, from the despatches which have been received from the Secretary for the Colonies, that a return to transportation in some modified form is inevitable, and they are thus driven to the conclusion that the only safe alternative left to the colony, is to accede to the proposition "that a modified and carefully-regulated introduction of convict labourers into New South Wales, or into some part of it, may, under the present circumstances, be advisable." The Committee composed, we presume, principally of settlers, evidently incline to the old system of assignment, but their opinion must be taken with some qualification. They further object to the system of probation gangs. But we pass from that part of the Report to that which states "the conditions and no other" on which they are willing to submit to a renewal of transportation.

"1st. That no alteration shall be made in the Constitutional Act 5 and 6 Victoria, c. 76., except with a view to the extension of the elective principle.

"2d. That the transportation of male convicts be accompanied, as a simultaneous measure, with the importation of an equal number of females, to consist of female convicts, as far as they exist, and the balance to be made up of female immigrants.

"3d. That, as a further simultaneous measure, such transportation be accompanied with an equal importation of free immigrants, as nearly as possible in equal proportion as to sexes.

"4th. That the wives and families of all convicts receiving permanent or temporary indulgences, should be brought out, and count as part of this free immigration.

"5th. That no fewer than 5000 male convicts be annually deported to this colony.

"6th. That the convict establishments properly so called, such as Norfolk Island, Cockatoo Island, ironed or road gangs of criminals under colonial sentence, &c., be maintained as heretofore at the cost of the British Treasury.

"7th. That two-thirds of the expense of police, gaols, and the criminal administration of justice, be paid by the Home Government; but that on the relinquishment of the land fund, and all other revenues or droits of the crown to the appropriation of the governor and legislative council, the whole of this branch of con-

vict expenditure be assumed by the colony, with a view to aid the British Government in defraying the cost of the free immigration stipulated for in the second and third conditions.

"8th. That in order to insure due permanency and efficiency in the regulations to be provided for the government and discipline of convicts, the sole power of making such regulations be vested in the governor and legislative council, saving entire the royal prerogative of mercy.

"The description of convicts, in the opinion of your committee, the colony should agree to receive from the mother country, on the above conditions, are : —

"1st. Young delinquents who have committed first offences, after little or no probation.

"2d. Convicts who have committed graver offences, after a probation considered adequate to the crime; the probation meant being probation under the separate system.

"3d. Convicts at the commencement of their sentences, who have committed various crimes.

"4th. If any convicts be received from Van Diemen's Land, convicts with tickets of leave.

"It appears to your committee that the first two classes of convicts, having undergone certain probation, might receive tickets of leave on their landing, limited, as all tickets of leave should be, to some particular district; and excluding the holders of them from all permanent dwelling in towns. In arriving at this conclusion, your committee have been particularly influenced by the uniform testimony given in favour of the decent and orderly conduct of the Pentonville exiles, landed some time since at Port Phillip. While they consider this testimony, however, decisive in favour of the reformatory tendency of the separate system as now practised in that and other penitentiaries at home, they by no means admit that its general effects are more satisfactory in this respect than the old system of assignment; whilst the latter system has undoubtedly these marked advantages peculiar to itself,—that it entails comparatively but small expense on the public, and instead of teaching trades, which are for the most part useless, except in towns, where they might come unfairly and injuriously into competition with free labour, it trains the convict to those rural occupations which are most in demand, and by thus giving him an early taste for them, establishes ultimately that preference for a country life which afterwards preserves him from those temptations and vices of cities which occasioned probably his early downfall."

ART. II. — THE LAW OF ESTATES.

CHAP. V. — ESTATES BY THE CURTESY, AND AFTER POSSIBILITY OF ISSUE EXTINGUISHED.¹

It will be convenient to consider these two species of estates in the same chapter, as deriving their existence from the operation of a principle of law, and we shall find that neither of these estates has undergone any material alteration since the time of Littleton. First as to

ESTATES BY THE CURTESY OF ENGLAND.

We shall enquire, first, What it is; and next, How it is held and enjoyed, and in what estates it exists; and I. *What it is.*

“Where a man taketh a wife seised in fee-simple, or in fee-tail, general; or seised as heir in special-tail, and hath issue by the same wife, male or female, born alive; albeit the issue after dieth or liveth, yet if the wife dies, the husband shall hold the land during his life by the law of England.”² We have seen that it has been considered that the wife has a moral right to dower³; but the same learned Judge⁴ who said this has also observed, that the husband's tenancy by the curtesy has no moral foundation; and is therefore properly called a tenancy by the curtesy of England, that is, an estate by the favour of the law of England.

Four circumstances are absolutely required to the existence of this estate; namely, 1. Marriage. 2. Seisin of the wife. 3. Issue. 4. Death of the wife.

¹ See the preceding chapters, 4 L. R. pp. 33. and 277., and 5 L. R. pp. 33. and 265.

² Litt. s. 35.; Co. Litt. 30 a. The quantity of estate may be varied by custom. Thus, in gavelkind, the husband only takes one half (Rob. on Gav.); but the birth of issue is not necessary. 2 Bl. Com. 128. It appears from Glanville (lib. 7. c. 18.), that the right to curtesy was originally confined to the *maritagium* of the wife. But when Bracton wrote, this right appears to have been extended to all the lands whereof the wife was seised, whether she acquired them by inheritance, or as a *maritagium*, or by donation. Bract. 497 b. 8 a.

³ See 5 L. R. 266.

⁴ Sir J. Jekyll, 2 P. Wms. 702.

1. With respect to the marriage, it must be between persons capable of contracting together, and duly solemnised. It should however be observed, that although where a marriage is void, the man does not acquire a title to curtesy; yet if it be only voidable, and is not annulled during the life of the wife, the husband will be tenant by the curtesy; for a marriage cannot be avoided by the Ecclesiastical Courts after the death of either of the parties.¹

2. *Seisin.*—With respect to corporeal hereditaments, it must be a seisin in deed. Thus Lord Coke² says, if a man dies seised of lands in fee-simple, or fee-tail, general, and they descend to his daughter, who marries, has issue, and dies before entry, the husband shall not be tenant by the curtesy; yet in this case the husband had a seisin in law. But if she or her husband had entered during her life, he would have been tenant by the curtesy.³ The time when the seisin commences, whether before or after issue had, is immaterial; for if a man marries a woman seised in fee, is disseised, and then has issue, and the wife dies, he shall enter and hold by the curtesy. So if he has issue which dies before the descent of the lands on the wife.⁴

But it is to be borne in mind, that the possession of a lessee for years is the possession of the person to whom the inheritance descends, before entry or receipt of rent. Therefore if lands, which are let for years, descend upon a married woman, who lives beyond the day on which the rent became due, without receiving it, yet her husband will be entitled to curtesy.⁵

Where the wife's estate was let for life before the marriage, the husband cannot acquire a seisin thereof, and will

¹ 1 Cru. Dig. 146.; Kenn's case, 7 Co. 44.; Hine v. Harris, 4 Mod. 182.

² Co. Litt. 29 a.

³ There seems no good reason for this distinction, which does not now exist as to dower. 5 L. R. 268. It is to be observed that in the bill relating to curtesy, which was brought in along with the other real property bills in 1832, 1833, and 1834 (but which a parliament extolled for its usual favour to the weaker part of the creation allowed to drop), seisin *in law* was sufficient to give a title to curtesy; but then the bill limited the estate to one half of the lands.

⁴ Co. Litt. 30 a.

⁵ Co. Litt. 29 a.; De Grey v. Richardson, 3 Atk. 469.; 1 Cru. Dig. 417.

therefore not be entitled to curtesy.¹ If a rent be reserved, it seems doubtful whether the husband will be entitled to have curtesy of it; in a similar case, Lord Coke was of opinion that a wife should have dower.²

Of some incorporeal hereditaments, a man may be tenant by the curtesy, though there have been no actual seisin of the wife, as in case of an advowson, where the church has not become void in the lifetime of the wife, or where there is a rent in fee which has not become due.³ Courts of Equity also recognise curtesy of trust estates, and the rule is now extended, as we have seen, to dower.⁴

All the authorities, previous to the late act as to descents, concur in laying it down that seisin in deed, although necessary, is sufficient to entitle the husband to curtesy; nor has it been usually considered, that any of the Real Property Statutes made any alteration in this rule. It is right however to state, that a late writer⁵ considers, that this rule, as to the estate by the curtesy is affected by the late Descents Act. "Until the law of descent was altered by the recent act," says this gentleman, "it was necessary that the wife should have acquired an actual seisin of all estates of which it was possible an actual seisin could be obtained; for the maxim was, *seisina facit stipitem*; and if the wife were not actually seised, the issue could not trace their descent from her, or, in other words, could not inherit as her heir. And it would seem, that under the law of inheritance as it now stands, the husband *can never become tenant by the curtesy to any estate which his wife has inherited*. For descent is now traced, not from the person last seised, but from the last purchaser. The issue of the wife, therefore, must trace their descent as heirs to the estate, not from the wife, but from the purchaser, and there is consequently no possibility of their ever inheriting the estate as her heirs. The condition, therefore, which would entitle the husband to become tenant by the curtesy

¹ Co. Litt. 29 a., 32 a.

² 4 Co. 1 a.; 9 Vin. Ab. 261.; Turner v. Sturges, Dy. 91.

³ 2 Bla. Com. 127.; Perk. ss. 468, 469.

⁴ See 5 L. R. 271.

⁵ Mr. Joshua Williams's Law of Real Property, 108.

cannot be fulfilled." This view, although a great many treatises on this estate have appeared since the statute, is not supported, so far as we are aware, by any other writer, and seems to be founded on a wrong construction of the Descents Act. It is true, that for the purposes of that act, and "to the intent, that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require," descents shall be traced as Mr. Williams states; but this provision cannot, it is conceived, affect a settled rule on quite a different subject, the alteration of which certainly never was in the contemplation of the framers of the act.

3. *Issue*, which must, however, have the following qualities to entitle the husband to curtesy:—1. It must be born alive. 2. In the lifetime of the mother. 3. And be capable of inheriting the estate. It is not necessary to prove that the child cried; any other evidence will be sufficient.¹

The issue must be born in the lifetime of the wife: so that if she dies in childbed, and the issue is taken out of the womb by the Cæsarean operation, the husband will not be entitled to curtesy. For, at the instant of the mother's death, he was clearly not entitled, as having had no issue born; but the land descended to the child, while in his mother's womb; and the estate, being once so vested, shall not be taken from him and his heirs.²

It is immaterial whether the issue be born before or after the seisin of the wife. Thus if, after issue is born, lands descend to the wife, be the issue dead or alive at the time of the descent, the husband shall be tenant by the curtesy.³

¹ Co. Litt. 29 b.; Bract. 438 a.; 8 Co. 34 b.; Dy. 25 b.

² Co. Litt. 29 b.; 2 Bla. Com. 127. It is therefore clear that Macduff would have taken any land of his mother's, extruding his father, as he

— "was from his mother's womb
Untimely ripp'd." *Macbeth*, act v. sc. 7.

and note that curtesy obtained in Scotland under the name of *curialitas*, with this distinction, that the widower forfeited his estates if he married. Crag. 1. 2. t. 19. s. 4. From this word some would derive the word curtesy, but we prefer the ordinary derivation, *antè*, p. 33.

³ 8 Co. 35 b. 33.

So if, after the death of the issue, the wife acquires lands in fee, and dies without having had any other issue, her husband shall be tenant by the curtesy. For the having issue, and being seised during the coverture, is sufficient, though it be at several times.¹

The issue must be such as is capable of inheriting the estate: therefore, if lands be given to a woman and the heirs male of her body, who has issue a daughter only, her husband will not be tenant by the curtesy.²

If a woman seised in fee simple marries, has issue, and then her husband dies, and she takes another husband, by whom she also has issue; though the issue by the first husband be living, yet the second husband shall be tenant by the curtesy; because his issue by possibility may inherit, if the first issue die without issue.³

The issue must not be of monstrous birth, as a monster cannot inherit by our law.⁴

4. *Death of the wife*, by which the estate of the husband becomes consummate.⁵ And it is to be observed that no entry is necessary to complete this estate; for, on the death of the wife, the law adjudges the freehold to be in the husband immediately as tenant by the curtesy.⁶

II. *How held and enjoyed, and in what estates it exists.*

All persons who are capable of taking freehold estates may be tenants by the curtesy. An alien cannot, however, be tenant by the curtesy; for, although he may take an estate by purchase, for the benefit of the Crown, yet he cannot take an estate by act of law; for the law will not transfer an estate to a person who cannot keep it, but must immediately give title to another.⁷ If an alien be made a denizen, and afterwards has issue, he may be tenant by the curtesy, in respect of such issue; though he would not be entitled on account of issue had before.⁸

But if an alien be naturalised, the naturalisation removes

¹ 13 Co. 23.

² Co. Litt. 29 b.; 8 Co. 95 b.

³ Paine's case, 8 Co. 34 b.; Litt. s. 52.

⁴ Bract. l. 1. c. 6.; 2 Bla. Com. 247.; Paine's case, 8 Co. 34 b.

⁵ Co. Litt. 30 a.

⁶ Bro. Ab. *Præcip.* 38.

⁷ Calvin's case, 7 Co. 25 a.

⁸ 1 Ventr. 416.; 1 Cru. Dig. 151.

all disabilities *ab initio*, and he will be tenant by the curtesy of issue born as such before or after the naturalisation.¹

Persons attainted of treason or felony, says Mr. Cruise², cannot be tenants by the curtesy; for, being *extra legem positi*, they are become incapable of deriving any benefit from the law, and, by consequence of this in particular, which intended to give the inheritance only to those who were capable of holding it during their lives.³

But persons convicted only of felony and treason may be tenants by the curtesy; for they forfeit only their goods and chattels absolutely, and of their lands the Queen gains but the pernanacy of the profits.⁴

It is to be observed that the husband shall be tenant by the curtesy of his wife's lands, though the wife be attainted of treason.⁵

A man may be tenant by the curtesy of an estate in fee-simple or in tail, or which is held in coparcenery or common with other persons; but no curtesy attaches to an estate for life or any less estate⁶; nor does it attach on an estate in joint tenancy, for the right of survivorship is preferred to all charges and incumbrances which do not amount to, at least, a partial alienation of the share.⁷

Before the Statute of Uses, the use or equitable estate was not subject to curtesy. But there is no doubt that now, this estate not only attaches to a use, but to a trust or equitable estate.⁸ There can be no tenancy by the curtesy, unless the children take the inheritance; for it is absolutely necessary, that the moment the husband takes as tenant by the curtesy, the inheritance should descend from the wife to her child or children. Lands were devised to Ann Boothby and her assigns for her life; if she married, and had issue male of her body living at the time of her death, then to such

¹ 1 Ventr. 416.; 2 Crabb's R. P. 109. ² 1 Cru. Dig. 151. ed. 3.

³ Bro. Ab. Curtesy, 15.

⁴ Stamf. P. C. 192.; Co. Litt. 92 b. 391.; 2 Crabb. R. P. 109.

⁵ Hal. P. C. 359.

Boothby v. Vernon, 9 Mod. 147. See also 2 Wms. Saund, 382 a. n. (1).; Doe v. Rivers, 7 T. R. 276.

Co. Litt. 185 a.; Burt. Comp. 353.

⁸ See *antè*, p. 35.

issue male and his heirs male for ever. Ann Boothby married, had issue, and died in the lifetime of her husband. It was held, that the inheritance, never having been vested in the wife during her life, her husband could not be tenant by the curtesy.¹

Entry at common law, for a condition broken, defeats the conditional estate, and all interest derived out of it; it therefore defeats the right of curtesy.² But where the wife has an estate in fee, subject to be divested by a shifting use or executory devise, it has been held that the right to curtesy may be enforced after the event, and notwithstanding the divesting and destruction of the estate upon which it attached³; but where the executory devise was to take effect on the death of the wife, leaving issue, and the limitation over was to such issue and their heirs, the husband was held not to be entitled to curtesy; for the issue must have taken as *purchasers*, and could not by possibility inherit.⁴

A man shall not be tenant by the curtesy of a remainder or reversion expectant upon an estate of freehold, unless the particular estate be determined during the coverture. But a man is entitled to curtesy of a reversion expectant on an estate for years, because the wife was seised of the freehold.⁵

Copyhold estates are not liable to curtesy by the common law; but there are many manors in which the husband of a female copyholder is, by particular custom, entitled to his wife's estate, if he survives her.⁶ He may also be tenant by the curtesy of a capital messuage, though it be *caput comitatus* or *baroniæ*, as well as of a castle, which serves for the public defence of the realm; and also of an honor or manor, with all their rights and appurtenances.⁷

¹ Boothby v. Vernon, 9 Mod. 147.; Sumner v. Partridge, 2 Atk. 47.; Doe v. Rivers, 7 T. R. 276.

² Co. Litt. 202 a.

³ Buckworth v. Thirkell, 3 B. & P. 652 a. See also Moody v. King, 447 Ray v. Pung, 5 B. & A. 561.

⁴ Barker v. Barker, 2 Sim. 249.

⁵ Co. Litt. 29 a. 32 a.; and see *antè*, p. 34.

⁶ 4 Co. 22.; Hob. 216.; 2 Watk. Cop. 69. 73. 87.

⁷ Co. Litt. 30 b.; secus as to dower, 5 L. R. 270.

Before the statute *De Donis*, conditional fees were subject to curtesy. And when that statute converted them into estates-tail, husbands were allowed to be tenants by the curtesy of them also.¹

In Littleton's description of curtesy, it is confined to women seised as heirs in special tail. There can be no doubt, however, but that the husband of a woman donee in special tail would be also entitled to curtesy.²

It was formerly doubted whether a man could be tenant by the curtesy of an estate-tail, after failure of issue capable of inheriting the estate, by which the estate-tail was in fact determined, and the donor's right to the reversion accrued. But it has been resolved that, in a case of this kind, the husband should have his curtesy.³ Curtesy is an incident so inseparably annexed to an estate-tail, that it cannot be restrained by any provision or condition whatever.⁴

According to a well known rule in equity, money agreed or directed to be laid out in the purchase of land, shall be considered as land to all intents and purposes. And upon this principle it has been held, that a man may be tenant by the curtesy of money agreed or directed to be laid out in the purchase of land. A person devised 300*l.* to her daughter Mary, to be laid out by her executrix in the purchase of land, and settled to the only use of her said daughter and her children; if she died without issue, the lands to be equally divided between her brothers and sisters. The plaintiff married Mary, the legatee, and had issue by her. She and her children being dead, and the money not laid out in land, the bill was, that the plaintiff might either have the money laid out in the purchase of land, and settled on him for life, as tenant by the curtesy, or have the interest of it during his life. The Court observed, that if this had been an immediate devise of land, the devisee would have been tenant in tail, consequently the husband would have been tenant by the curtesy. It was, therefore, decreed that the money should be considered as land, and that the plaintiff should have the

¹ 1 Cru. Dig. 153.

² *Ib.* 153.

³ Paine's case, 8 Co. 34.; Co. Litt. 30 a.

⁴ Co. Litt. 224 a.; 6 Co. 41 a.

interest and produce thereof during his life, as tenant by the curtesy.¹

Some incorporeal hereditaments, such as advowsons, tithes, commons, and rents, are liable to curtesy.²

Where property is settled to the separate use of the wife, with a declaration that the husband shall not be entitled to curtesy out of the lands, he will be excluded.³ But there must be a clear intention to exclude him; and in this, as in all cases turning on intention, there is some conflict in the cases.⁴ In *Morgan v. Morgan*⁵, an estate was settled to trustees in fee for the separate use of the wife during coverture, with power to appoint, and in default of appointment, in trust for the wife. The wife made no appointment, and it was held that the husband took as tenant by the curtesy.

An estate by the curtesy is no more than a bare estate for life; nor has this tenant any more privileges than a mere tenant for life.⁶

It is considered in many respects as a continuation of the wife's estate, therefore the husband is entitled to all those rights and privileges which his wife would have had if she were alive, and which were annexed to her estate.⁷ From the moment of the child's birth, or of the acquisition of the property of the wife (which ever last happens), he is enabled to convey an estate for his own life to any other person. Before the birth of a child he can convey a good estate for the joint lives of himself and wife.⁸

Tenant by the curtesy holds not of the heir, but of the next lord paramount.⁹

A tenant by the curtesy is qualified to be protector of a settlement.¹⁰

¹ *Sweetapple v. Bindon*, 2 Vern. 536.; *Cunningham v. Moody*, 1 Ves. 174.; *Dodson v. Hay*, 3 Bro. R. 404., S. P.

² 1 Cru. Dig. 155.

³ *Bennet v. Davis*, 2 P. Wms. 316.

⁴ *Roberts v. Dixwell*, 1 Atk. 607.; *Steadman v. Pulling*, 3 Atk. 433.; *Hearle v. Greenbank*, 3 Atk. 696.; S. C. 1 Ves. 298. Sir J. Leach, V.C., says: "The two cases of *Hearle v. Greenbank* and *Roberts v. Dixwell* cannot be reconciled." 5 Madd. 412.

⁵ 5 Madd. 408.

⁶ As to these, see 5 L. R. 35—40.

⁷ 3 Co. 22 b.

⁸ Co. Litt. 30 a.; *Anon.* 5 Bac. Ab. 852.; *Burt. Comp.* 350. (b).

⁹ 2 Inst. 301.; *Paine's case*, 8 Rep. 36 a.

¹⁰ 3 & 4 W. 4. c. 74. s. 22.

If a tenant by the curtesy aliened in fee, or in tail, or for the life of the grantee, it was a forfeiture of his estate, and the person in reversion might, by the stat. of Westminster 2. c. 24., have a writ of entry, in *consimili casu*.¹ But now a fine having been abolished, (3 & 4 W. 4. c. 74.,) its tortious effect, of course, no longer exists for the future; and by stat. 8 & 9 Vict. c. 106. s. 4., feoffments have no longer any tortious operation; and no forfeiture is created by any other mode of conveyance now in force. A husband does not forfeit his right to an estate by the curtesy by leaving his wife, and living in adultery with another woman.²

It appears to have been doubtful whether a tenant by the curtesy was punishable at common law for waste. It was therefore enacted by the statute of Gloucester, (6 Edw. 1. c. 5.,) that a writ of waste might be brought against him, and that he should incur the same penalties for committing waste as any other tenant for life.³

Secondly, as to

ESTATE TAIL AFTER POSSIBILITY OF ISSUE EXTINGUISHED.

1. *What it is.*—"Where tenements are given to a man and to his wife in especial tail, if one of them die without issue, the survivor is tenant in tail after possibility of issue extinct. So, if they have issue, and the one die, albeit that, during the life of the issue, the survivor shall not be said tenant in tail after possibility of issue extinct; yet if the issue die without issue, so as there be not any issue alive which may inherit by force of the entail, then the surviving party is tenant in tail, after possibility of issue extinct."⁴

"Also, if tenements be given to a man and to his heirs which he shall beget on the body of his wife; in this case the wife hath nothing in the tenements, and the husband is seised as donee in special tail: and in this case, if the wife die without issue of her body, begotten by her husband, then the husband is tenant in tail after possibility of issue extinct."⁵

¹ 2 Inst. 309.

² *Sidney v. Sidney*, 3 P. Wms. 269.

³ 2 Inst. 145. 301. 353. See further as to waste, 5 L. R. 38.

⁴ Litt. s. 32.

⁵ Ib. s. 33.

“And note, that none can be tenant in tail after possibility of issue extinct, but one of the donees, or the donee in special tail. For the donee in general tail cannot be said to be tenant in tail after possibility of issue extinct; because, always during his life he may by possibility have issue, which may inherit by force of the same entail. And in the same manner, the issue which is heir to the donees in especial tail cannot be tenant in tail after possibility of issue extinct, for the reason above said.”¹

Nothing but a moral impossibility of having issue can give rise to this estate. Thus, if a person gives lands to a man and his wife, and to the heirs of their two bodies, and they live to a hundred years, without having issue, yet they are tenants in tail; for the law sees no impossibility of their having issue.²

Further, the impossibility of having issue must proceed from the act of God, and not from the act of the parties. For if lands be given to a man and his wife, and to the heirs of their two bodies, and after they are divorced, *causa precontractus* or *consanguinitatis*, their estate of inheritance is turned to a joint estate for life; and although they had once an inheritance in them, yet for that the estate is altered by their own act, and not by the act of God, viz. by the death of either party without issue, they are not tenants in tail after possibility of issue extinct.³

A person may be tenant in tail after possibility of issue extinct, and of an estate in remainder, as well as of an estate in possession. Thus if a lease be made to A. for life, remainder to B. and his wife in special tail, and B. dies without issue, his widow will immediately become tenant in tail after possibility of issue extinct.⁴

2. *How this estate is held and enjoyed.*—This is usually explained by contrasting the privileges enjoyed by a tenant after possibility, with those of a tenant in tail.

This estate, though, strictly speaking, not more than an

¹ Litt. s. 34.

² Co. Litt. 28 a., 40 a.; and see 5 L. R. 269.

³ Co. Litt. 28 a.

⁴ Bowles's case, 11 Co. 81 a.; But see Cordal's case, Cro. Eliz. 315.; Cas. temp. Hardw. 17.

estate for life, partakes in some circumstances of an estate tail. For a tenant in tail, after possibility of issue extinct, had many qualities or privileges in common with a tenant in tail; the only one now of importance, is that he is punishable for waste, because he continues in by virtue of the livery upon the estate tail.¹

It is said in *Herlakenden's case*², that if a tenant in tail, after possibility of issue extinct, fells the trees, the lessor shall have them; for inasmuch as he has but a particular estate for life in the land, he cannot have an absolute interest in the trees: but he shall not be punished in waste, because his original estate was not within the statute of Gloucester.³ This is denied by Lord Coke, who is reported to have said, that at common law this tenant had a fee, and consequently full power to fell and dispose of the trees; and notwithstanding the Statute *de Donis* had made the estate to be only for life, yet the privilege and liberty was not taken away.

In *Lewis Bowles's case*⁴, the Court observed that tenants in special tail, at the common law, had a limited fee simple; and when their estate was changed by the Statute *de Donis*, yet there was not any change of their interest in doing of waste; so when, by the death of one donee without issue, the estate is changed, yet the power to commit waste and to convert it to his own use was not altered nor changed, for the inheritance which was once in him. And in a later case Lord Eldon held, upon the authority of the preceding cases, that tenant in tail after possibility, being punishable for waste by law, has equally with tenant for life, without impeachment of waste, an interest and property in the timber.⁵

The Court of Chancery, by analogy to the rule adopted in the case of tenant for life without impeachment of waste, will restrain persons seised of estates tail after possibility of issue extinct, from pulling down houses, cutting

¹ Co. Litt. 27 b.; 2 Inst. 302.; 1 Rol. Rep. 184.; 11 Rep. 80 a.

² 4 Co. 63 a.; 1 Rol. Rep. 184.; 1 Cru. Dig. 142.

³ 4 Co. 63 a.

⁴ 11 Co. 81 a.

⁵ *Williams v. Williams*, 15 Ves. 419.; 12 East, 209.; 3 Mad. 519.; *Whitfield v. Bewitt*, 2 P. Wins. 240.

down trees planted for shelter or ornament, or any other kind of malicious waste.¹

There are, however, three qualities annexed to this estate, which prove it to be, in fact, only an estate for life. 1. If this tenant, before the recent act, had made a feoffment in fee, it would have been a forfeiture, because, having no longer a descendible estate in him, he cannot transfer such an estate to another, without the prejudice and disherison of the person in remainder. But now a feoffment made after the 1st day of October, 1845, shall not have any tortious operation. 2. If an estate in tail or in fee in the same lands descends upon him, the estate tail after possibility of issue extinct is merged.² 3. An exchange between this tenant and a bare tenant for life is good; for, with respect to duration, their estates are equal.³

The privileges which this tenant enjoys arise from the privity of estate, and because the inheritance was once in him; therefore if he grants over his estate to another, his grantee will be bare tenant for life.⁴

Tenants in tail after possibility were prohibited from suffering a common recovery⁵; and the statute abolishing this assurance⁶ has not extended the power of disposition given by that act to this kind of tenant in tail.

¹ 2 Cha. Ca. 32.; *Abraham v. Babb*, 2 Freem. 53.; 2 Show. 68.; *Anon.* 2 Freem. 278.

² 3 Prest. Conv. 263.

³ Co. Litt. 27 b.; 11 Co. 80 b.

⁴ Co. Litt. 28 a.; *Apreece's case*, 3 Leon. 241.

⁵ 14 Eliz. c. 8.

⁶ 3 & 4 W. 4. c. 74. s. 18.

ART. III.—RECOLLECTIONS OF A DECEASED WELSH JUDGE.

No. VI.

I WAS in Parliament during the memorable session of 1809, commonly and justly called by the names of two very different individuals, and thus known for Mrs. Clarke's Session, or the Duke of York's Session — much as one Parliament was called the Lack-learning Parliament, because no lawyers sat in it. The character testily given by Lord Coke of that body is applicable to the session in question:—" *Never a good law was made thereat.*" Mr. Curwen's bill against seat-selling forms no exception, nor Mr. Perceval's against office-selling; and, as ancillary to the prohibition, against advertisements offering premiums for procuring places. Indeed, we still see constant advertisements, that so much will be given to any one that shall procure the advertiser "a permanent mercantile situation;" the meaning of which every one knows.

T' other day I refreshed my recollection of the York and Clarke Session, by reading the evidence and the debates, as given in Cobbett's Parliamentary Register. Nothing can be more curious, and nothing much more interesting. But my memory supplies many things not to be found in "The books." The most striking of them is the intense interest, the feverish excitement occasioned from first to last both in-doors and out. All other business, foreign and domestic, was utterly neglected; all other topics became quite tasteless. No company could assemble without an instantaneous broaching of the prevailing subject; no other matter could attract the least attention in the House of Commons. To no motion, either on the war, or the Convention of Cintra, so late the engrossing theme, could the least quarter be given. It was Mrs. Clarke—it was Miss Taylor; the cleverness of the one, or her profligacy—the innocence of the other, or her dubious character: and as for the poor Duke, except among the

ministers or some gallant opposition chiefs, who scorned bad popularity and detested cant, like General Fitzpatrick and Mr. Windham, not one voice was raised for him.

The next thing which I well remember was, that the multitude never formed anything like an accurate notion of the case, or even of the issue tried; indeed, 99 in every 100 you met never got beyond the admitted fact of a double adultery; and the same feeling seized a vast number of the Judges—the members of the House itself.

The next remark I make is on the conduct of the case. Mr., or, as he was called, Colonel Wardle, mismanaged it as entirely from first to last, as it was, humanly speaking, possible to mismanage any case. The very last thing he could do was to examine a witness. His stupidity was extreme; his dulness intense; he seemed void of reason. He held in his forefoot a list of questions, and he often went on putting them in succession, without regard to the answers he had got. He never took any objection to the irregular, indeed the illegal, course of proceedings often taken against him; and his own irregularity, the consequence of his gross ignorance of all procedure, of all law, gave an abundant justification to whatever his adversaries chose to attempt for his discomfiture. His aspect even was pitiable, and commanded no respect or sympathy, not even compassion. He was helplessness personified, greater by far than any young barrister ever showed on having his first brief put into his hands on his first circuit. For some time it seemed that he and his cause must entirely fail; and Mr. Canning was tempted, by the impunity he thus gained, or seemed to gain, so far as to declare that this inquiry must cover one party or the other with infamy—a gross imprudence, even for him, the most indiscreet of men—and of which, as he was wont to do in a scrape, he made some singularly clumsy and wholly unsuccessful efforts to get rid, by somewhat shuffling and not very honest explanations. Indeed, until Lord Folkestone came to the unhappy Colonel's assistance, there seemed no chance of any but one result, that the Colonel should be laughed out of Court with his case.

The worst part of his conduct was the want of honesty and fairness which it betrayed. He was early detected in an un-

truth of a glaring description, and he was shown to have become possessed of Mrs. Clarke's letters by unfair, almost by fraudulent or by violent, means. Nor did many men, in their hearts, much dissent from Mr. Windham's cutting remark, that he would much rather be proved guilty of the very worst things falsely imputed to the Duke of York, than have brought forward the case on Wardle's grounds, with the associations he had submitted to, and by the means he had employed to obtain the evidence in support of his charges.

I have mentioned the extraordinary sensation which the opening of this strange scene produced both on the Parliament and the people. But it was not an eight days' wonder; the feeling excited was rapidly and widely spread over the country: but it was not superficial; it took a deep root; it engaged all men's attention; but it also sunk in their hearts, and the excitement was kept up from hour to hour for weeks. The Duke was run down by a party in the hands of the multitude; and that party numbering among its members men of the highest character, the weight of the accusations which they preferred, with the statements of the witnesses whom they brought forward, overpowered the unfortunate object of the popular hatred; so that anything like a fair trial was hopeless, and he was compelled, at the close of the investigation, to retire from the Chief command for a season. Then the storm subsided; men began to reflect; the characters of the accuser and of his witnesses were canvassed; the evidence which they had given was re-considered; accidental quarrels among the conspirators broke out; the Courts of Law were appealed to; and somewhat of a clamour, with better foundation than the outcry against the Duke of York, broke out against his persecutors: so that, after two years' retirement, his restoration to office was hardly a matter of either opposition or surprise. It is, however, well to cast our eyes back on the manner in which the storm against him was raised, because it affords curious illustration of the mischiefs that ever attend the letting popular influence break in upon the administration of justice; and, above all, it shows how nearly akin to the worst crimes committed by Judges in our courts, under the pressure of despotic authority, when the Crown ruled without control, are to the faults of a popular assembly,

acting under the fierce and vulgar tyranny of the multitude out of doors.

I shall not soon forget the impression made upon me by the proceedings in this remarkable case. It seems as yesterday, although above ten years have since passed over my head, and I have seen something of the parliamentary judicature in lesser cases. But at that time all was new, and all was strange. Accustomed to the procedure of our courts of law, governed as they are by rules, and, above all, by the rules of common justice, which require that no one shall be tried behind his back, nor without free power to sift the proofs against him, and a distinct knowledge of the charges under which he lies — accustomed to the rules of evidence, above all to the cardinal rule that nothing shall be told by any witness which is not within his own knowledge; much more, that no interference of the mob and of the rumours propagated among the mob shall be suffered to influence the judges — accustomed, above every thing, to the cardinal principle which prevents his adversaries from sitting in judgment on any man, and requires that they who decide shall be guided only by the merits of the case, and moved by the desire alone of distributing justice: what was my amazement to find every one of these same laws violated at every moment of the inquiry; to see the most obvious principles of procedure outraged continually; to find that the Commons had absolutely no rules of evidence to guide them, but proceeded as the mob would, and the mob in a state of excitement; above all, to observe that those who assumed the part of judges never furnished the accused with a notice of the charges against him, and were themselves throughout in a state of party animosity either for or against him, which absolutely prevented the possibility of justice being done!

I recollect, from the very commencement of the inquiry, my horror at the kind of evidence allowed to be given. A doctor, the first witness, said he carried a message from a Mr. Knight to Mrs. Clarke, offering her 200*l.* if his brother could get an exchange from his regiment; and he was asked by Mr. Wardle through what medium he expected it to be effected. He was then allowed to say:

"I suppose it was pretty *well known* that she was acquainted with a great personage at the time." I stared a little at this kind of testimony; but I was soon to see very much worse things. He was desired to speak to things he knew, and not to surmise or understanding; but he was suffered to go on, and tell, what the House greedily swallowed, all he had heard, and suspected, and understood, and knew nothing about. Then he was asked if for what he was saying he had any reason but his own surmise; and he answered, "No other reason upon earth."

I now clearly perceived that to keep the Honourable the Commons within any kind of rules was a thing impossible; because it was plain that, even when for an instant they saw the right path, they were wholly incapable of following it for ever so short a time. We had samples of levity and indecorum occasionally to enliven our researches. Thus, when Mr. Wilberforce had put a question as to Mrs. Clarke's residence, Mr. Fuller (whom we used, for his familiar use of oaths, to call *Blast Fuller*) asked the witness "whether she did not live next door to the tabernacle." The chairman asked if he should put the question, and the House, but in roars of laughter, answered "No."

Then came forward the celebrated Mary Ann Clarke; and she having in various matters deposed to what was proved false by the testimony of Dr. Thyme and Mr. Knight, respectable persons, and also having grossly prevaricated and shown herself to be wholly unworthy of credit, the House still resolved to go on; and, in so doing, they called for Col. Wardle, one of their fellow-members, and the prosecutor of the accusation. Him they severely and irregularly interrogated as to all his dealings with Mrs. Clarke; and he also prevaricated, was contradicted by his witness, and contradicted himself; and then came down to correct his evidence next day, admitting what he had formerly denied, as, that he had seen Mrs. Clarke the day before his first examination, which he now confessed he had done three several times. A more desperate figure than that of this noisy patriot, the flower of the Principality, I fear I must call him, never did I see in any court or place.

Then the inquiry so pleasing to the House, so tickling to the prurient appetite of the multitude, so dear to all newspapers, and so engrossing to all drawing-rooms and all club rooms, was persisted in, and worse irregularities were hourly perpetrated by the judicial the Commons. One of the grossest of these was that Mr. Adam, a member, having taken the Duke of York's part against Mrs. Clarke, out of doors, because he was counsel of the Duke, though he said without any salary, the House suffered Col. Wardle to examine him as to the state of his family, the promotion of his son, an officer in the army, against whose commission not a suspicion was ever ventilated, but solely to show that Mr. Adam had received favours from the Duke. Thus a collateral issue was tried, absolutely unconnected with the Duke's conduct; and the House was to examine evidence on the utterly irrelevant question, whether Mr. Adam was really a gratuitous adviser of the Duke, when no one could for one instant fancy that by saying he was so, he could ever have meant any thing except what his words plainly import, namely, that he acted without a salary or fee!

I recollect a Capt. Huxly Sandon being examined as to the Duke of York having, through Mrs. Clarke's influence, given one Col. French leave to raise a corps. Well! he was asked what passed between, not the Duke and him, or even Mrs. Clarke and him, but Col. French and him! My old friend Pigot naturally objected. Gibbs, then Attorney-general, joined in the objection. But Perceval and Yorke, though admitting the evidence to be mere hearsay and utterly illegal, were for receiving it on the strange ground that Wardle should not be stopped in any way, and that there should be the fullest leave given "to sift the matter to the bottom." Protect us, I inwardly prayed, from such proceedings! So, when my character and conduct is in question, any thing that any one may say to any other is to be stated to my judges, in order "to sift the matter to the bottom!"

The reason why Messrs. Perceval and Yorke took this course against all right and justice, and all colour of law, was too apparent; they dared not do any one thing, or permit any one thing to be done, for even in appearance stopping the inquiry.

The multitude out of doors, and their as mob-like representatives within, would not hear of it. The inquiry must go on at all events, and whatever questions any one chose to ask of any person, must be permitted for fear the investigation might seem to be stopped, or publicity to be shunned. However, we had some more specimens of House of Commons inquiry. I remember a member, Mr. Mellish, of a very light complexion and hair, was said by one witness to have shaken hands with the Duke at Mrs. Clarke's. There could not, by possibility, be any one thing more utterly immaterial to the question, or to any question. But Mr. Mellish was examined, and said he never had seen Mrs. Clarke till he saw her at the bar, and never had, in his whole life, been in her house. Hereupon the witness being again asked, said it was not Mr. Mellish he had seen, but he had been told it was by Mrs. Clarke, and he could not help her telling a lie! A new issue was then raised, whether it was Mr. Finnerty, and whether he had been seen at Mrs. Clarke's. The witness said he saw a newspaper man there of a very awkward figure, sallow complexion, rather ugly, and very badly dressed; that he belonged either to the Chronicle, Times, or Post. It would be quite needless to recollect all the vague irrelevant matters thus gone into, or to record the instances every minute afforded, of all the tales which any one had picked up, being received in evidence by the Commons of England in parliament assembled on a charge of corrupt conduct against the sovereign's son, holding the high office of Commander-in-Chief.

In the course of the inquiry, witnesses were committed for prevarication. General Clavering was in this way sent to Newgate for as scandalous and as low-lived an attempt as ever was made to push his fortune with the Duke, by volunteering false evidence before the House, he having himself actually bribed Mrs. Clarke to obtain a place for him; and the House, in its inquisitorial functions, did not scruple to investigate the amours of Mrs. Clarke with other persons not charged with any thing, and mere private individuals; nor did the Hon. House hesitate to break open a witness's dwelling house doors, and private desks, in order to get at his letters, and to find letters of Mrs. Clarke.

In truth, I felt such rooted disgust at the whole of these proceedings, that after some weeks I ceased to attend; and when I returned, I found from Pigot and other professional friends, that all had been conducted throughout just as it had begun—the whole inquiry presenting a picture of anarchy, of lawless disorder, of mob proceeding, and ignorance or wilful neglect of every one principle that regulates the course of judicial conduct.

It is little wonder if the Duke of York was overpowered by this daily appeal to the mob. He durst not show himself in public for fear of the rabble.—His friends were held to be contaminated.—His adversaries were extolled to the skies.—Meetings were universally held to thank Wardle, Folkstone, Burdett, Romilly, and Ferguson. This last was a gallant officer distinguished in the service, and distinguished also by the Duke's constant kindness in their common profession. He was in nowise called upon to take any part; he might have abstained, and no one could have remarked it, for he never before or since took any part in debate. He came forward, however, and spoke shortly, but strongly, against the Duke, and against the truth of the case, as almost all men now think. His vanity was gratified; he was held up as an example to the army. All the officers of it considered him to have done a foolish, many thought a bad, action; but the Duke of York only showed his sense of this conduct by promoting him to a foreign command the moment he resumed his station at the head of the army! This magnanimity was almost unexampled; so all felt it: the General must have felt it acutely; but he so far failed to profit by it, that he very soon after came home on account of health, and it was plainly seen that he was not one of those officers who, as the Duke's eulogy on General Moore purported, "above all things loved to be with the soldier, and preferred serving to any other pursuit." General Ferguson went for a month or two to Brussels after the war was over, and never has served since. Certes, he is not the one who has crowned himself most with glory by the inquiry into the conduct of the Commander-in-Chief. But he is greatly valued as a party man; and among the Whigs he is held in very great estimation.

The examination of a witness by some scores of persons promiscuously, and almost all of whom are in utter ignorance of legal proceedings, or of the nature of evidence, is one of the most absurd parts of the proceeding I have been commenting upon. I know well that old Jeremy Bentham holds cross-examination very cheap, and would substitute for it what he calls *undequaque* examination, that is, he would have the whole by-standers in the Court pelt the witness with questions, all of them springing from the brains of ignorant men, utterly unacquainted with the matter in issue, and wholly ignorant what the trial is about. This absurdity, which the jurists of the Bentham school of course hold to be profound wisdom, requires no experience to demonstrate its unutterable folly. But bad as it is, even the Benthamites never dreamt of the last step of absurdity and injustice, the leaving all the audience who chose, some after hearing the case in whole, some only in part, and even those who had only heard one side and not a word of the other, to interfere to pronounce judgment upon it. This is a reach of absurdity and injustice far beyond Jeremy and his followers. But this is what I had the pain, the mortification, the great humiliation of seeing the House I belong to do in the Duke of York's case, and do with entire self-satisfaction, and to the unspeakable comfort and satisfaction of the people at large, and the great edification and glory of those who are zealots for Parliamentary privileges.

No one can look back on the famous inquiry on which I am casting my recollection and not bless Heaven that courts of law do not resemble the House of Commons. We lawyers may justly say that we "thank God we are not as other courts are, or even as this House of Commons." If ever a device was fallen upon more fitted than any other to bring justice into contempt, and Parliament into hatred, it is the course of proceeding pursued by the Commons in such cases, and in all that relates to their quasi-judicial functions—for example, their privileges. They follow no known rule; they abide by no fixed principle; they despise all authority; they are a law unto themselves; they are both party, counsel, judge, executioner; and, moreover, they lay down the law by

which they are to try, and to convict, and to sentence, in every case, after the alleged offence has been committed, and they adapt the new *ex post facto* law to the particular case which they have to try. That such a course should long be borne seems impossible.

But I have been drawn aside from my purpose, which was to mark the evils of judicial proceedings conducted by tribunals under the immediate control of a tyrant. The Judges under Henry VIII., and Elizabeth, and James I. were guilty of the most flagrant acts of cruelty and injustice through dread of the absolute prince they served. Even so were the peers. Look at the testimony on which Somerset was convicted of Overbury's murder. It was all hearsay ; and rested on the confessions, mutilated in receiving and in proving them, of other parties who had been executed. Even the Gunpowder Plot was inquired into by any thing rather than legal evidence ; and Anne Boleyn was murdered by process of law. But the mob is as ruthless, as fell a tyrant, as any Tudor, any Stuart. Strafford and Stafford by Parliament, and the sufferers for the popish plot by the Judges, were all tried under the mob influence, by Judges acting under terror of the mob out of doors. Their proceedings are a disgrace to the name of Judge in this country. I continued all through the Duke's business to consider the House of Commons as precisely placed in the like circumstances. They were acting under the dread of the multitude. Their conduct of the inquiry was as contrary to all law, and all rules of proceeding, as any course ever taken by either Parliament or Judges in the most arbitrary reigns of our history.

**ART. IV.—WRITERS ON THE CONFLICT OF LAWS,
OR PRIVATE INTERNATIONAL LAW.****Part II.¹**

THE questions and doctrines of the writers on the *Conflictus Legum*, so far as they arise or exist between the citizens or subjects of the same independent state, do not fall under, or form any part of, International Law, properly so called. They are regulated entirely by the legislative and judicial powers of each sovereign state. And no sovereign, obviously, has any right to interfere with, control, or modify the legislation, or judicial determinations of any other sovereign state. But, when the questions and doctrines arising from, or consequent upon, the *Conflictus Legum* arise between, or affect the interests of, the citizens or subjects of different independent states, they clearly fall under International Law. And there can be no doubt, that in a variety of cases, occurring between the individuals of different nations, from their intercourse for the purposes of commerce or otherwise, the judicial tribunals of one nation, in time of peace, actually have given, and do give effect to, and enforce, the laws of other nations, although different from their own, *ex comitate gentium*, as it has been termed. The question, however, here arises, whether this temporary or qualified relinquishment of sovereign legislative or judicial power is merely voluntary, a matter of choice, or, at most, the discharge of a moral duty; or whether it is the observance of a legal duty, or judicial obligation, which may be enforced; in other words, of a rule of compulsory justice.

For taking the former view of the matter, there are evidently strong grounds. Such seems to have been the leaning of the opinions of modern international jurists generally, from the description they give of the doctrines of the *Conflictus Legum*, and of private international law, existing, not *jure gentium*, but *ex comitate gentium*. Indeed, it is

¹ See Part I. 4 L. R. 318—335.

difficult to take any other view, consistently with the admission of the absolute, unlimited, and exclusive sovereignty of independent states. Accordingly, this doctrine was thus distinctly expounded early in the eighteenth century, by Ulric Huber, in his *Prælectiones ad Pand.*, vol. ii. de Leg. “*Rectores imperiorum, id comiter agunt, ut jura cujusque populi intra terminos ejus exercita, teneunt ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium præjudicetur.*” And, in his *Jus Publicum Universale*, lib. iii. cap. 8. § 7., he adds, “*Summas potestates, cujusque reipublicæ indulgere sibi mutuo, ut jura legesque aliorum in aliarum territoriis, effectum habeant, quatenus sine præjudicio indulgentium fieri potest. Ob reciprocam, enim, utilitatem, in disciplinam juris gentium abiit, ut civitas alterius civitatis leges apud se valere patiatur.*”

The same doctrine has continued to be maintained, as we shall afterwards see, at greater length, by the more recent international jurists of the present century, such as the late eminent professor and judge Mr. Justice Story, Dr. Foelix, formerly mentioned, and M. Mailher de Chassat, the vigorous opponent of the Continental sect of Jurists, and their adherents in this country, who attempt to solve the questions arising from the *Conflictus Legum*, affecting the interests of the inhabitants of different independent states, through the medium of the personality and reality, and mixed nature of laws, statutes, and customs.

On the other side, it is perhaps pushing, or admitting, too far, the claim of right on the part, even of independent states, to absolute and exclusive sovereignty, to hold, that they have no superior on earth, or in the universe, except the Eternal, Omnipotent, and all-wise Creator; and that, although morally bound by the precepts of ethics, *præcepta virtutum*, they may within, and throughout their own territories, legally or juridically, except from their consent, expressed in conventions, or virtually implied from usage, act in any way they choose, and establish any laws they choose, with reference to foreign nations, and the individual inhabitants, of whom they are composed, unless induced to act otherwise from wise considerations of reciprocal convenience. We are rather inclined to

think with Grotius, the great parent of International Law, who, it may be remembered, wrote early in the seventeenth century; and to agree with Professor Ortolan, in the following remark recently made by him, in his impartial review of the learned work of Dr. Fœlix. "Every nation," as Dr. Fœlix says, "is too jealous of its independence, to recognise any superior material power; but the author is wrong in adding, or intellectual power. No human being, individual or collective, is above reason. It is precisely because each nation, in principle, has not any material power above it, that it ought to recognise and follow that of reason, and that it pretends to honour reason, even when, in reality, it does not follow its dictates." In this remark, there is certainly nothing new; nothing beyond the dictamina rationis of Grotius, or, perhaps, the ratio juris of the Roman Law. But this use of the term "Reason," either in English or French, may be liable to objections, philological, or philosophical, such as those urged against it by Mr. Bentham. And as the question is of importance, in International Law, it seems to merit here some investigation, and, if practicable, elucidation.

As we could not discover in the qualities of human positive law, designated by the appellations of real, personal, or mixed, any valid ground for extending the operation of such positive laws, beyond the territory of the state or government which established them; and are of opinion that, in the cases in which a *Conflictus Legum* occurs, the grounds for such extension must be sought in other considerations of a legal or juridical nature; so we can as little concur in the opinion of the writers on the *Conflictus Legum*, either in the seventeenth and eighteenth centuries, or in the present century, that the *Comitas Gentium*, or mere courtesy of nations, affords a stable basis, for what can be truly, or correctly, denominated International Law. Indeed, the more recent writers on the *Conflictus Legum*, such as Mr. Justice Story and Dr. Fœlix, while they apparently hold out the *Comitas Gentium* as the foundation of private International Law, in cases where a *Conflictus Legum* occurs, seem, at the same time, to be sensible of the insufficiency of such a foundation.

And, throughout his valuable treatise, Dr. Fœlix seems to rest private International Law, in cases where a *Conflictus Legum* occurs, chiefly on the intervention of the consent of nations as expressed in treaties, or in their internal legislation, and jurisprudence or judicial determinations, or as virtually implied from long established usage.

Having observed, from the recent work of Dr. Fœlix, that the objection, which had occurred to us, had been recently urged in Germany, we procured from that country the principal work referred to—that of Dr. Wilhelm Schæffner, published at Frankfurt-am-Main, in 1841,—entitled “*Entwicklung der Internationalen Privatrechts*,” or *Development of Private International Law*. And the objection is thus shortly stated by Dr. Schæffner in section 30 of his Treatise. “The strange idea of *Comitas Gentium*, which originated in a totally perverted and erroneous notion of the nature of laws, appeared in many older writings, and is still to be found, at this day, in the work of Story. Now, if we examine more nearly how the principle of *Comitas Gentium* has been carried out, or succeeded, we perceive with astonishment that properly, or truly, it has nowhere been found applicable, or fit for use; or, at least, that in most cases an appeal has been made to something quite different from *Comitas*. How was it possible to attain a reasonable result from such infinitely vague and unjuridical ideas? In fact, we are not in a condition, upon this basis, to determine aright, even by the way merely of approximation, the most simple case of private international law. Where is the beginning, where the end, of *Comitas*? How can questions of law be answered according to political considerations, which are the most changeable in the world?”

To this objection Dr. Fœlix makes the following answer. “Section 12. An estimable author, but whose opinion we cannot share, has opposed to the doctrine of Mr. Story, that the idea of *Comitas* is vague, and that it has rarely been taken by authors, and the courts of law, as the basis of their decisions. In fact, the expressions *Comitas Gentium*, reciprocal convenience, present by themselves a very general idea: but among the infinite number of relations which may

emerge between different individuals belonging to different nations, it has been found necessary, in order to designate the whole collection of the considerations, which may guide governments and judges in the cases of the conflict of laws, to employ expressions having a general meaning. In truth, authors and courts of law, instead of speaking of the *Comitas Gentium* and their reciprocal convenience, have entered into philosophical reasonings. But, at bottom, the arguments of this description constitute merely motives of reciprocal convenience (*ob reciprocam utilitatem*) for the two nations to admit into their respective territories the application of foreign laws; and then we return always, from such arguments, to this fundamental principle, that the application of foreign laws is merely a concession, and cannot be exacted as a right. We repeat it, all nations are too jealous of their independence to recognise a superior judge, having by himself the power of deciding, that a foreign law shall be carried into execution in another state."

Now this answer appears to us to be unsatisfactory, on more grounds than one; and we shall endeavour to investigate the matter a little more minutely.

The idea of compulsion, or physical force, by such means, as are placed at the disposal of mankind on this earth, is, we apprehend, inherent in, and essential to, the idea of human positive law. If a rule of action possesses not this essential quality, it is not, strictly and properly speaking, a law: the obligation to observe or act in conformity with it, is not legal; but ethical, not warranting the use of compulsion; although such observance, in the latter case, may be much more meritorious and praiseworthy.

The great Adam Smith, it is believed, was the first philosopher in this country, who distinctly pointed out a most important distinction between justice, and the other virtues; inasmuch as the chiefly negative rules of justice are susceptible of enforcement, while the rules of the other virtues are not. But to appeal to more recent authority, one of the most acute, precise, and profound descriptions of laws in general, is, perhaps, that given by Count Destutt de Tracy, in his "*Commentaire sur l'Esprit des Loix de Montesquieu*,"

which he wrote for Mr. Jefferson, President of the United States of North America, in 1811, and which he afterwards published at Paris in 1819. And as the work does not appear to have attracted general notice in this country, we shall make a pretty full extract from the Commentary, Book I. pp. 1, 2, &c.

“Laws are not, as Montesquieu says, necessary relations which flow from the nature of things. A law is not a relation, and a relation is not a law. This explanation does not present a clear meaning or signification. Let us take the word Law in its specific and particular sense: this acceptance of words is always the first which they have had; and we must always trace back to it, to understand them well. In this sense, we understand by a law, a rule prescribed for our actions, by an authority which we regard as having the right or title to make this law. This last condition is necessary; for when it is wanting, the rule prescribed is no longer anything but an arbitrary order, an act of violence and oppression. This idea of law comprehends that of a punishment attached to its infringement; of a tribunal which applies this punishment; of a physical force, which causes it to be undergone. Without all this the law is incomplete and illusory.

“Such is the primitive sense of the word Law. It has been, and could have been, created only in the state of civil society, already commenced. Afterwards, when we remark the reciprocal action of all beings upon each other; when we observe the phenomena of nature, and those of our intelligence; when we discover that they operate, all in a constant manner, in the same circumstances, we say, that they follow certain laws. These are what are called natural laws, or laws of nature. * * * There are, then, laws of nature, which we cannot change, and which we cannot disobey, with impunity. For we have not made ourselves; and we have made nothing, of what surrounds us. Thus, in so far as we shall leave a heavy body without support, we shall be crushed by its fall. In so far as we shall not make arrangements, in order that our desires may be accomplished, or, what is the same thing, in so far as we shall cherish in ourselves wishes, which cannot be executed, we shall be unhappy. That is beyond doubt.

“ There, the authority is supreme ; the tribunal infallible ; the force insurmountable ; the punishment certain ; or, at least, every thing takes place, as if all that were so.

“ Now, in our societies, we make, what we call, Positive Laws, that is to say, artificial or conventional laws, by means of our authorities, our tribunals, and our factitious forces. These laws, then, must be conformable to the laws of our nature, must be derived from them, must be the consequences of them, and not contrary to them ; without which, it is certain, the latter would prevail, that our object will not be fulfilled, that we shall be unhappy. It is that, which makes our positive laws be good or bad, just or unjust. The just is what produces good ; the unjust is what produces evil.

“ The just, then, and the unjust exist, before positive laws, although it is only the latter we can call just, or unjust ; the others, the laws of nature, are simply necessary ; our part is no more to judge of them, than to contradict them. Doubtless there is a *just*, and an *unjust*, before any of our laws. If it were not so, there would never be any of them ; for we create nothing. It is not to us that it belongs to cause a thing to be conformable, or contrary to our nature. We do nothing but observe and declare, what is wrong or reasonable, according as we deceive ourselves or not. When we proclaim as just, a thing which is not so, that is to say, when we order or command it, we do not thereby render it such, which would be beyond our power ; we merely proclaim an error ; and we do a certain quantity of evil, by giving for support to this error the quantity of force of which we dispose. But the law — the eternal truth, which is contrary to it, remains the same.

“ We conclude, then, that the laws of nature are anterior, and superior, to ours ; that fundamental justice is what is conformable to them, and that radical injustice is what resists them ; and that, therefore, our posterior laws ought, in order to be really good, to be consequent upon those more ancient, and more powerful, laws. This is the spirit, or the true sense, in which positive laws ought to be made ; but this spirit it is not easy to seize and unfold.

There is a great distance between the first principles and the last results."

Proceeding upon those principles, and applying them to private international law involved in every *Conflictus Legum*, affecting the interests of the citizens or subjects of different independent states, we conceive we shall find in private international law, as well as in public international law, not only the pre-existing just or unjust, in a mere moral or ethical point of view, — not susceptible of enforcement by physical means, — or the mere dictates of private interest and individual convenience; but the pre-existing just and unjust, inferring legal right and obligation, admitting of physical compulsion, and capable of being made positive human laws, through recognition by nations, either by express convention, or by consuetude, — usage established for ages. And, in determining in this private international law, arising from the *conflictus*, the law of which country ought to be adopted, as the rule of our decision, we shall find the same elements for that decision, as in public international law, or international law generally, — the elements of justice, reciprocity, and general, or universal, expediency which, when recognised in the practice of nations, thereby become positive international law.

We quite agree, however, with Dr. Fœlix, that the necessity for the application of foreign laws cannot be derived *à priori* from legal fictions, or the supposed nature of law, as real, or personal, or mixed; and that any legal obligation to admit, in certain cases, the recognition of foreign laws, can only rest upon the relations of different nations towards each other. But when these juridical relations are not conceived or imagined, *à priori*, as a *beau idéal*, such as Rousseau's *Social Contract*, but are observed, as actually existing between nations, there seems no reason for excluding the recognition of these relations in private international law, *viz.* in the intercourse of the individuals composing different nations, for the purposes of social life, for the cultivation of art and science, or for the more frequent purposes of commerce, and the exchange of commodities, either direct or by barter, or through a circulating medium, any more than in what has

long been recognised, as public international law, in negotiation through public ministers, in concluded treaties of peace, and in established usages, regulating the mode of warfare during hostilities.

The difficulty here seems to arise from the inaccurate idea generally entertained of the mode, in which the law is held to be formed, and the right thereby created. Born and living in an advanced stage of civilisation, we find the legislative and judicial powers distinctly established; statutes enacted, and judicial precedents recognised as obligatory; and that no right can be inferred, and the performance of no actions compelled, except through the state or government, and particularly its judicial establishment. And thence, we conclude not only that no right exists, or can be enforced in civil society, unless it has been enacted by the legislature, or has been, or may be, decided by the judicial tribunals; but also, that the right is solely derived from, and rests upon, the statute and common law thus established.

Now, the first of these conclusions is well founded; but the second is only partially so. It is, no doubt, true that in their union into civil societies or communities, occupying separate portions of the earth, as territories, whether voluntarily or by conquest, or other compulsory measures, it has been found urgently expedient or necessary to have the united power of the community or state concentrated in a government; containing, among others, two important powers, that of framing, beforehand and prospectively, regulations for the conduct of the individuals of whom the nation is composed; and the other that of enforcing those statutory regulations, and also of determining such disputes generally, as may arise among such individuals, without involving any breach of any statute. But it is not true, that all the judicial relations of individuals, living together in civil society arise entirely from, and are solely founded on, either the statute, or the judiciary law of a country. A certain portion do; and may be called factitious rights, and created by human power and legislation. But the great portion are founded on the juridical relations, which arise, and come to be perceived and felt by individuals, from the circumstances in which they come to be placed, with regard to each other,

in consequence of their position on this earth, their connection by birth, and the various events which occur in the progress of society. And most of these relations arise and are felt and conformed to or observed, voluntarily, and without any previous enactment or judicial determination.

The gradual formation and development of the internal jurisprudence of a people has been certainly very fully, and satisfactorily, and beautifully illustrated by the celebrated M. de Savigny, partly in his *Treatise* in 1814, in answer to that of Thibaut, which procured him the title of the Founder of the Historical School of Law, but chiefly in his still greater work first published in Autumn, 1839; in which he farther explained and modified his views, so as to exclude neither the doctrines of the Philosophical School, so far as founded in fact, nor the due regard to be paid to Nationality in every system of law.

Between separate and independent nations, certainly, no such legislative and judicial powers exist, to enforce their respective rights, as among individuals living in the same state. But, as, in a state, a great proportion of the rights of individuals arise from relative position, connection by birth, and other supervening circumstances and events, and are not derived from, or founded on, any pre-existing enactment of the legislature, or judicial determination, so do such rights arise among nations in relation to each other, and the individuals of whom they are composed, without any anterior legislation or judicial determination, enacted or pronounced by any superior sovereign state. Indeed, it would be absurd to say, that, without a pre-existing positive human law, without a previous enactment by a legislative body, or a previous judicial determination, as an example or precedent, individuals, when assaulted in their persons, have no right of self-defence; or, that nations, when their territory is invaded, and their existence endangered, have no right to resist such aggression; or that individuals or nations, who have been violently or clandestinely deprived of their habitations, or of their goods requisite for the maintenance or comforts of life, have no right to enforce restitution of possession, or re-delivery of those articles, if still in existence, or to exact by force

adequate reparation; or that individuals or nations, who have entered into engagements by contract or treaty, or occasion damage by their illegal acts, are not thereby bound, or are not liable in damages for breach of contract or injury inflicted; or that individuals or nations, who avail themselves of the good faith of others for their own advantage, are not bound to exercise and exhibit equal good faith towards others; or that individuals or nations are entitled to exact from others what they do not themselves allow to others.

In fact, then, the Positive Law, as it is called, does not precede, far less create, the right. The right precedes the law, and the law merely ascertains and declares the right, and applies the machinery for its enforcement. Under and in virtue of the social union, the enforcement of the right is accomplished by the power of the united many against the few; by the power of the state or government. Among separate and independent states, no compulsory power of this kind exists, other than war, and the union of several states against one or more. But, although the machinery for enforcing the right among nations is very inferior, the right, nevertheless, exists. Nor is this right a mere fiction, or mere imaginary *beau ideal* of law, *à priori*. It exists in consequence of the relative position, connection, and circumstances, in which, in the course of events, individuals and nations come to be placed. In a grossly ignorant age, some rights may not be perceived and felt. But in general, the more important are perceived and felt without great difficulty. And it would be quite unphilosophical, if not absurd, for such a limited intellect as the human, to deny absolutely, the existence of what it does not perceive.

We are aware, as formerly noticed, that, after the example of many learned and able jurists, the late Mr. Justice Story, where he did not derive it from the personality or reality of statutes, rested private international law on the *Comitas Gentium*, and that Dr. Fœlix has adopted that theory, as being the best. We are also aware that the same opinion has been expressed by perhaps a still greater jurist than either of these, M. C. F. de Savigny, in his great work, of which the publication commenced in Autumn, 1839; and our confidence in the

opinion we have formed is, no doubt, shaken by such authority. But it may be remarked, that the attention and studies of the transcendent jurist last mentioned have been chiefly directed to the origin, progress, and gradual development of the internal jurisprudence of nations; while, in his last great work, he has allotted only one short section to international law. And if Professor Savigny had studied the latter, as minutely and profoundly, as he has studied the private law, or internal jurisprudence of nations, we conceive he would, upon his own principles, have found that, between nation and nation, and between the individuals of whom they are composed, there exist or arise various *Rechtsverhältnisse*, or *rapports de droit*, or juridical relations, from neighbourhood or vicinity, from commercial or other acts of intercourse, and from other events and combinations of circumstances, similar, or at least analogous, to those, which he found to arise between, or among, individuals living together in civil society, without any anterior legislation or *Gesetzgebung*.

If, indeed, this *Comitas Gentium*, on which Private International Law has been founded, this voluntary civility or courtesy, this rule of reciprocal benevolence or beneficence, be converted into a rule of justice by the mutual consent of nations, the objection will be removed. For the effect of this consent is to transform the rule of ethics into a rule of law, susceptible of enforcement by physical means. But, when the *Comitas Gentium* is, by such consent, transformed into Positive Law, which may be done by express convention—as by treaty, or virtually, though tacitly, by implication from long-established reciprocal usage in the same way—as a willingness to benefit another by giving possession, delivery, or use, may be converted into a legal obligation by contract between individuals, it is no longer *Comitas*; and it should not receive such an appellation, being, thenceforward, Positive International Law.

But, even without such consent, we are humbly of opinion, that Private International, as well as Public International Law, has a foundation in the human constitution, and in the circumstances in which men are placed; and under the events to which they are subjected in this world, independently of

their consent, either express, or implied from their habitual action.

It is a clear deduction from the experience of ages, that, in order to make any advancement in art and science ; in order to enable them to resist wild animals ; to procure food for the propagation of the species by cultivating vegetable produce, and taming animals adapted for their sustenance ; men must unite in civil society, must occupy a particular portion of the earth as territory, must have an exclusive power over that territory, must concentrate the power of the individuals living together in society, in the community or state ; must exercise that power thus produced by union for putting an end to private war, as it has been called, and for bringing about a state of quiet and tranquillity, in which individuals may occupy themselves for their respective purposes of procuring food, and clothing, and habitation, bringing up their families, accumulating necessities, acquiring intelligence and skill, and transmitting their various acquisitions to succeeding generations. But all these and other similar purposes, it is plain, may be attained, without ascribing to each separate and independent nation an absolutely exclusive and despotic power over its own territory, subject to no restriction or control whatever, on the ground of a separate nation having no superior on earth. For, first, independently of the superiority, which, we formerly saw, Professor Ortolan ascribed to reason, or what Grotius termed the *Dictamina Rationis*, a separate state may possibly have, physically, a superior on earth. The union of two or three nations may create such a material, and effectual superior. Or the operation of those physical laws which the Almighty Creator has established on earth may raise up such a superior ; as, when the grievous oppression exercised by the French Emperor Napoleon over the conquered nations of Germany, roused the slumbering mass of population to such a pitch, as empowered their governments, with the military aid, and the supplies for the subsistence of their armies, which the wealth accumulated by British industry enabled that government to afford, ultimately to humble and extinguish the most powerful sovereign who has appeared in modern times.

But, secondly, even supposing that separate and independent states have, in point of fact, no physical or material superior on earth, it by no means follows, that nations are not subject to juridical relations and legal obligations, with regard to each other. For this latter proposition is by no means inconsistent with the two fundamental principles of Private International Law, which Dr. Foelix lays down in Chapter III. of his Preliminary Title, under the authority of various jurists, such as Burgundus, Rodenberg, Voet, Cocceii, Huber, Story, Vattel, Meier, Boullenois.

“The first general principle,” he says, “in this matter, results immediately from the fact of the independence of nations; every nation possesses and exercises, solely and exclusively, the sovereignty and the jurisdiction within, and throughout the whole extent of its territory. From this principle it follows, that the laws of each state affect, bind, and regulate, *pleno jure*, all the properties, immoveable and moveable, which are found in its territory, as also all the persons who inhabit this territory, whether they are born in it or not; in fine, that these laws affect and regulate, in the same manner, all the contracts concluded, all the acts or deeds consented to or performed, within the boundaries of this same territory. Consequently each state has the power of regulating the conditions under which all things, immoveable and moveable, existing within the limits of its territory, may be possessed, transmitted, or appropriated, as also to determine the state and the capacity of the persons who are found there, as well as the validity of contracts and other deeds which have originated there, and the rights and obligations which result from them; finally, the conditions under which actions or suits at law may be instituted and followed out, within the limits of this territory, and the mode of administering justice.” Now all this seems quite correct, with an exception, perhaps, or modification, relative to the place, where contracts are to be implemented or executed, or to be set aside and annulled.

In the second principle laid down by Dr. Foelix we also concur: “No state, no nation, can, by its laws, directly affect, bind, or regulate, objects or matters, which are situated out of or beyond its territory; or affect and oblige the persons

who do not there reside, whether they be subjected to it, by the fact of their birth, or not. This is a consequence of the first general principle; the contrary system, which would give to each nation the power of regulating the persons, and things existing without its territory, would destroy the equality between different nations, and the exclusive sovereignty which belongs to each of them."

"These two principles," continues Dr. Fœlix, "lead to an important consequence, and which contains our entire doctrine; namely, that all the effects, which foreign laws can produce in the territory of a nation, depend absolutely upon the consent, express or tacit, of that nation."

Now this inference, or deduction from the two principles before enumerated, we cannot admit to the unlimited extent here laid down. So far as nations remain in a quiescent and sort of negative state, in relation to each other, and have no intercourse, the deduction may be correct. For although it seems to have been held, that a nation during a famine, and in a state of starvation, may legally send out ships of war, and seize cargoes of grain on board vessels sailing on the High Seas, provided they pay to the owners of the cargoes the market price of the grain, and the freight and other charges due to the owners of the vessels; it must be an extreme necessity indeed, which would warrant one nation to invade the territory of its neighbour, for the purpose of seizing part of their stores of grain or other provisions: and we by no means contend for the existence of such a legal compulsory right. But if nations once pass from this negative state of internal quiescence, and, from whatever motive, the individuals of one nation go, and are admitted into the territory of another nation, there then arises a juridical relation, a *Rechtsverhältniss*, a *rapport de droit*, involving an obligation on the latter nation and its government, to protect the persons of such individuals from assault, and their goods from violent or fraudulent abstraction, to the extent, at least, to which they afford such protection, to their own citizens or subjects.

Or, if one nation, or its government, admit the individual subjects of another independent state to purchase its produce, or to sell their goods, which produce cannot, or is not to be

delivered for some time, or the price of which goods cannot or is not to be paid for some time, is not the nation or government admitting such intercourse legally bound, through the medium of its judicial establishments or otherwise, to enforce the delivery of such produce, or the payment of the price of such goods, when due? Or, is such an act on the part of the nation, in its collective or corporate capacity, a mere act of benevolence or favour, which may be withheld or not at pleasure, or performed merely from courtesy, *ex Comitatus Gentium*, and with a view to *Convenience Reciproque*? Would not such a government, in refusing to give effect to the contracts or conventions, which it had allowed to take place between its subjects and those of foreign states, be countenancing and supporting, if not committing, acts of injustice? Would not such a refusal justify measures of retorsion, or, if on a great scale, constitute a just cause of war, a *casus belli*?

This might be further illustrated by an enumeration of a variety of particular cases; but this seems unnecessary. In short, when in the intercourse of the individuals of whom different nations are composed, juridical relations arise, or the rules of justice, which are distinguished from the other virtues by their susceptibility of enforcement, are involved, and the question is no longer moral, or ethical merely, but juridical, or legal, what it is universally expedient to enforce, *Private International Law*, like *Public International Law*, will be found to rest, not merely on the *Comitatus Gentium*, the courtesy of nations, or *Convenience Reciproque*, but on the same juridical principles, which we have seen precede the *Positive Laws*, established under and in virtue of the social union. The necessity for the individual intercourse of nations may not be so indispensable, for the quiet enjoyment of life and its comforts, and for the advancement of the species in civilisation, as the union of individuals in one society, and under one government. But still, the advantages of,—the necessity for the intercourse of nations with each other, afford sufficiently grave considerations, for the observance, and to warrant the enforcement, of those rules of justice, which in civil society protect life, person and property, award repara-

tion of damage, compel the performance of contracts, and secure to the succeeding generation, the property of their progenitors, under the legal precepts, *Neminem lædere, suum cuique tribuere, pacta servare, damna resarcire.*

What we maintain, then, is, that the sovereignty, dominion, and jurisdiction of independent nations, is absolute and exclusive, only within its own territory, or that portion of the earth which it has physically occupied and appropriated; that when an independent state allows its citizens or subjects to have intercourse with the inhabitants of other states, for the purposes of commerce or otherwise, and to enter into connections or transactions similar to those, into which its own subjects enter with each other, and which are enforced by the state under the social union, the state itself, as well as its inhabitants, thereby creates juridical relations, and comes under legal obligations, which it is bound, and may be legally compelled, to see or cause to be fulfilled. So far, we apprehend, private international law does not rest upon the *comitas* or courtesy, or upon the mere consent of nations, but may be legitimately enforced by such physical means, as such states have at their disposal. Nor does it seem necessary, for the true independence and welfare of nations, to push their exclusive right of sovereignty so far, as seems to be done by the jurists of the present day, or to make private international law entirely dependent for its existence on the consent of each separate nation. For the true independence and welfare of nations, it seems quite sufficient, that the absolute sovereignty of each state should be limited to its own territory, to the exclusion of all foreign control or dictation; that its laws should regulate the conditions, on which all properties, moveable or immoveable, within its territory, are held, appropriated, or possessed, transferred or transmitted; should determine the state and capacity of the persons resident within its territory; should determine the validity of all contracts and other deeds which have originated therein, and the resulting rights and obligations; and should determine the conditions, on which actions or suits at law may be prosecuted. Such appear to be all the powers and rights necessary for, or involved in, the idea of national independence. And to admit

that each nation has a sovereignty beyond these powers, dependent entirely on its consent, or its mere will and pleasure, or caprice, is to recognise, not genuine liberty, but licentious rule.

In the preceding, and in the present, part of this article, we have arrived at the conclusions, that the qualities of laws, as real or personal, do not afford valid grounds for the solution of the questions in Private International Law, arising from the *conflictus legum*; that the *Comitas Gentium* is but a very unstable basis for any system of compulsory law; and that the sovereignty, independence, and welfare of nations, do not require recourse to be had to such an unstable basis, or to any other basis, than to those juridical relations, and legal principles, on which the common law, or internal private jurisprudence of civilised nations is, in a great measure, if not entirely, founded. In the remainder of this article, we shall notice the leading cases in international law, in which a *conflictus legum* usually occurs, or is likely to occur, and the chief juridical considerations, and legal principles, according to which it may be the duty of the judges of a civilised nation to administer justice between natives and foreigners, in some cases agreeably to the laws of their own country; in other cases, agreeably to the laws of the country, to which the foreigners belong.

ART. V. — THE NEW PILGRIM'S PROGRESS.

CHAPTER II.

So I saw in my dream that Pilgrim, having parted with Formal (who took the Golden Road), proceeded on his way ; having thus, as he thought, manfully resisted the temptation of worldly riches and honours, preferring to follow the straight path. On, then, he walked, his head erect and his heart dilated with self-satisfaction. But, as he thus strode along, I observed that the robe which had been given him as the most valuable of all gifts — the robe of humility — was losing the secure hold which he at first had of it, and was gradually slipping away : and the higher he held his head, and the more loftily he walked, the more he seemed in danger of losing it altogether. And then, as at every weak moment, a thousand busy fiends are at hand to tempt a pilgrim to destruction ; so I saw that our traveller did not escape. Wicked voices began to whisper in his ears : deceitful shapes to present themselves. That evil wind, CONCEIT, began to puff him up, and to tell him he was superior to his race : that he was destined to higher duties. LUST OF POWER began to creep into his frame and poison his blood ; and I saw that here the road became so slippery and uncertain that he could hardly keep his feet. Here, also, two suddenly joined him, as if they had started out of the earth. The one had a flushed face, a wild eye, and hasty step. But the menacing look and livid complexion of the other were far more displeasing ; and I observed that he endeavoured to conceal an unlighted torch which he held in his hand.

The first of these soon addressed Pilgrim. “ Good morrow, friend ; I am glad to see you on this road, — the only true road to Justice, — the road of Reform.”

“ I think so, indeed,” said Pilgrim.

“ And yet you travel but slowly,” said the stranger. “ I

walk faster than you, I see. I soon got over Prejudice Hill, and snapped my fingers in King Precedent's face, and will not pay him a farthing of tribute. I have run almost all the way, and now I am ready for any thing."

Pilgrim. "And who may you be? I do not recollect your face. I am called PILGRIM."

Headstrong. "My name is HEADSTRONG, and by my mother's side I am a Restless. I am all for Reform. I come from the town of Innovation, and would be glad to join company with you. I have already met a man who says he is journeying on this road. He seems a stirring fellow. His name is LAWLESS, and he comes from the town of Confusion. If you please, we will walk on together."

Pilgrim. "Be it so. But you walk rather fast."

Headstrong. "We shall the sooner reach the goal."

Pilgrim. "I know not that. Slow and sure, I say, and I feel the road a little unsteady here."

Headstrong. "No, no, good friend, we must move on, or we do nothing."

"Aye," said the other traveller, joining in, "I agree with you in that. I like not delay either. Let us forward. If we are opposed, let us oppose. There is no travelling the road without seeing blood shed. We must be prepared for that. Much must be shed before we can get at the point to which we are travelling. There may be some riot before all things work smooth again."

And now Pilgrim began to doubt his company.

"Why?" said he, "I see no necessity for force here. If we are attacked, we must defend ourselves. But having the voice of reason on our side, we want no violence. But what have we here?"

As he spoke, a turn of the road showed them that they approached the walls of a formidable fortress, the guns of which commanded the whole road. The outworks, indeed, stretched over a large part of it. On a banner which floated on its citadel appeared the words, "CONSTITUTED AUTHORITY—GOVERNMENT."

The travellers here drew up to consult as to the best

means to be taken to pass by this fortress without suffering harm.

Headstrong. "What is there to be afraid of? Let us go on boldly, although all the world were against us."

Pilgrim. "That were madness. How can you escape instant death from the guns?"

Lawless. "Stop, I have some materials that may be useful. Let us wait till the night; we may then make use of my torch. I warrant me there is booty here. Let me call in my friends."

Pilgrim. "What! set fire to this goodly building, and cause the death of innocent men, and for booty? Away with so base a thought!"

And here Pilgrim held back from his companions. And now I saw that Headstrong rushed forward, and, after throwing mud and dirt at the stone walls for some time, at which those in command only laughed at him, he incautiously approached too near, and suddenly sunk into a concealed pit, and what became of him I know not.

A more severe fate was reserved for Lawless. He waited until it became dark, and then crept up to the fortress with his combustibles, but, using them incautiously, he fell a victim to his own arts, and miserably perished.

And what of poor Pilgrim, who had thus suddenly lost confidence in the path in which he had only a few hours ago walked so stoutly? Thus was he misled by bad companions. The worst being those in his own heart. He had at once withdrawn from his new friends, when he found out their intentions. But how was he to proceed in his journey? Was he to turn back and give it up, or was he to expose himself to the guns of the fortress? After ruminating on all this with much fear—for thus was he enfeebled by the check that he had met with—he began to consider whether he could in any way avoid the persons in the fort, whom he thus assumed to be enemies, and resolved upon trying whether he could not find a path by going round, and so get on the road again on the other side safely and surely.

And now what he had declined at the Golden Road he was thus induced to do from evil passions getting possession

of him. When once resolved to leave the path which he had chosen, he found no difficulty in finding a way which seemed to promise what he wished, and to this he then turned. Passing over a stile, a path opened which looked well, and on he went. But now night began to close in upon him, and he soon got into difficulties. He was tormented by wandering lights, which led him here and there, having no fixed guide. Now he slid down declivities; now he had to clamber up steep ascents;—in fact, he found he had got into the land of UNCERTAINTY, and every step he took was doubtful. Here he passed the night very miserably, and peradventure might have been lost; but as the day began to dawn he met a man carrying a lanthorn, who asked him what he did there.

Pilgrim. —“Alas! I have wandered out of the road, and I cannot find my way.”

“Are you not one Pilgrim,” said the stranger, “and are you not journeying to the City of Justice?”

Pilgrim. —“I am that man; but meeting with bad company, I was afraid to pass that part of the road commanded by the guns of a certain fort there, and thus taking a round-about path I have made no progress.”

“You were wrong,” rejoined the other, “what have you to fear so long as you walk on your journey peaceably? You will find friends in the fort instead of enemies. If you had gone boldly to the moat, where the drawbridge is raised, and demanded free passage, I doubt not that it would have been given to you. As it is you have nearly lost yourself, and seem hardly aware of what you have undertaken. If you are thus easily led from the road, how can you hope to overcome the difficulties which you must meet? My name is TRUTH. I cannot flatter. I must see whether you are fit for your work. I will ask you a question or two.”

Pilgrim. —“Say on, sir.”

Truth. —“Are you prepared to meet poverty, disgrace, and obloquy?”

Pilgrim. —“I think so.”

Truth. —“Are you ready to see your best actions attributed to the worst motives; to find others reap the reward where you have had the toil; to hear the very man most

depreciate you who owes you most ; to be injured first, and then rendered odious by those who injure you ? ”

Pilgrim. — “ For this I am prepared. ”

Truth. — “ To find yourself deserted by him you relied on most ; to be thwarted more by seeming friends than by open foes ; to have your most innocent actions misconstrued ; to discover that calumny can turn away the only eye that looked kindly on you, and render hateful, even to yourself, the best pleasures, of your life. ”

Pilgrim. — “ I have not yet been much tried, but believe I can endure all this. ”

Truth. — “ Are you prepared to face instant death if you meet it on your road ? ”

Pilgrim. — “ I am. ”

Truth. — “ That we can bring at once to the test. I will take you at your word. ”

And in an instant they stood on the edge of a cliff, beneath which yawned a bottomless abyss.

Truth. — “ Now, friend Pilgrim, I will see if you are worthy of travelling this road. Will you throw yourself from this cliff ? ”

Pilgrim. — “ Is it necessary to obtain my object ? Shall I thus reach the City of Justice ? ”

Truth. — “ You will. ”

Pilgrim. — “ Give me some evidence that you are a spirit of truth. ”

And here, looking at Truth, a pure celestial light irradiated his form and attested his divine nature.

Pilgrim. — “ It is enough, I am ready. ”

Truth. — “ Leap boldly then, in the name of that Justice which you have invoked. ”

And now Pilgrim, throwing his sword on the ground, leapt boldly into the abyss. But his end was not to be then, and borne up by unseen hands, he was replaced by the side of Truth. That great spirit exclaimed with joy, “ Worthy are you, brave Pilgrim, of what you have undertaken, and, although you have thus wavered for a moment, you will now feel a strength you never felt before. You have had a pain-

ful but a necessary lesson. I will now lead you back into the true road."

Thus Pilgrim found his way back, his armour sadly tarnished it is true (his robe of humility having nearly slipped away), but still with his spirits greatly restored.

"And now," said his guide, "the day wears apace, I must leave you. I have other business to attend to. But I will stand by you if necessary. And first I will make you a parting gift, which, if I know you, you will value aright. Take this wallet, it is full of seed."

Pilgrim. — "And what shall I do with it?"

Truth. — "Scatter the seed wherever you find an opportunity and likely soil. Although it will yield little fruit at first, it will in time grow up, and you will walk in pleasant shade, under its lofty branches. These seeds are truths, which it will be your delight to scatter, and they often take root in the most rugged and forbidding soil. Farewell; faint not and fear not." And here he left our Pilgrim to himself.

That traveller, taking the other's advice, proceeded boldly to the moat, and, sounding the horn, the Warder appeared and asked him what he wished.

Pilgrim. — "Free passage on my road to the City of Justice."

Warder. — "Did I not see you with some evil companions of late?"

Pilgrim. — "It is true, sir; but they were merely chance wayfarers on the road. I disclaim all fellowship with them."

Warder. — "Well, then, you may go on; we have no enmity to persons who pass along the road in a peaceable manner. I wish you well."

Thus went he on, restored in soul. Nor should I omit to say that here the road became exceedingly pleasant. Cool breezes fanned his cheek, and from either side of the road hung down refreshing fruits, delightful both to sight and taste. But, more than all, was Pilgrim comforted by returning confidence in himself, and his seeing clearly that his path, although an humble, might still be a happy one.

Thus he journeyed on, until he came to a part of the road in which began a new territory; and here was written, as a

direction for the guidance of travellers, "THE LAND OF THE LADY COMMON LAW."

Now Pilgrim had not proceeded far, when a stately building came in sight; and this, he soon found, was the palace of the lady of that country; and as he approached, he was informed by her servants that travellers were free to enter, and entertainment was abundantly supplied to all; moreover, that the good lady frequently condescended to receive her guests herself, and converse with them.

As Pilgrim examined the palace, he observed that it appeared to have been built at different times, and of various kinds of architecture. The Saxon arch was visible in many parts of it; a part of it showed traces of the Norman era, but few of these were left, while most of its pillars, and nearly all its foundation, were to be traced to the Roman style.

Passing through the ample halls, which were filled with servants and officers in rich and costly suits, Pilgrim was conducted to an apartment where he took off his armour, and thence into a banqueting room, where he was sumptuously entertained. After he had thus refreshed himself, he was informed that the bountiful lady whose guest he was condescended to admit him to an audience. He was then introduced to a hall, at the end of which, on a chair of state, sat THE LADY. She graciously invited him to approach and to sit down beside her, and thus they entered into discourse. He observed that she was now much advanced in years; but age could not subdue the fire of her eyes, and there was something at once sweet and majestic in her countenance.

"Approach," she said; "you are not unknown to me by fame. You have set out on the right road, which, if properly and patiently followed, will lead you to Justice; and I am interested in all who wish to obtain it."

Pilgrim.—"I desire no better guide, please your Ladyship, than yourself."

The Lady C. L.—"No; I am now getting old, and I find that infirmities daily creep upon me. My right arm you see is fairly disabled, and I cannot walk nearly so quickly as I once could. My sight, too, is somewhat fail-

ing. Still, with all my faults," and here her Ladyship showed some bitterness, "I am a little more expeditious than my sister MADAME EQUITY, who lives on the adjoining estate. But I am sensible that I am neither quite what I was nor quite what I should be. I trust, however, I have done some good in my day. I have now lived a long time through good and evil report. The happiest part of my life was the last century. Then every body praised me; and one Blackstone wrote a book to show that I was as near perfection as possible. He paid me the prettiest compliments, and considered my very defects as beauties: he humoured me in all my caprices, and with him I could not do any wrong. Thus, when some one said that it was only fair that my property should go on my death to my grandfather, if I had no children or brethren, he said it was absurd, and even wicked to think of it, calling him my 'decrepit grandsire,' and telling me that the more old and infirm he was, the less reason was there for making any provision for him. He also assured me that my telling a lie was no harm whatever, that it was only an innocent 'fiction,' which, although it might 'startle' me, was, in fact, 'highly beneficial and useful.' In short, I got so vain and conceited, that I at last believed all that was told me. But, alas! that day is over, and now I have the mortification of finding that many of my wisest sayings are called downright nonsense, most of my rules are disobeyed, and half of my customs and practices are positively laughed at. However, I have enough left to have some power yet; and I do not think that after all they can quite get rid of me. I had a practice of calling in twelve of my neighbours, and of asking their opinion. This, I am told, is quite old-fashioned, and had better be discontinued. In short——But I weary you; I am getting a little garrulous."

Pilgrim.—"Madam, I venerate all your words. If I may speak boldly, I should say your flatterers have been your worst enemies; but all must admit that most of your maxims are wise and just."

The Lady C. L.—"Stop, good Pilgrim: you see how crippled I am; I cannot disguise this, do what I will. I

have got full use of my left arm, but my right, you see, is sadly enfeebled. Now, I want your help as to this. I hear you are a stout soldier, and I want you to be my champion. I have a good healthy frame, and might enjoy better health than ever if it were not that I am troubled with the visits of a monster, who enters my territories, benumbs my limbs, and breathes on me his poisonous breath."

Pilgrim. — "My life is at your service, Lady. Who may this monster be?"

The Lady C. L. — "His name is FEUDALITY. I was at one time, I grant you, much more under his power. I have gradually become emancipated, and he has got more weak and feeble. It was only a few years ago that I was enabled to give him a severe blow, as he meddled with most of my actions, as to which I have almost entirely got rid of him. But he still interferes with the conveyance of my property which he has managed to get under his control. Now, I would willingly get rid of him, as a pestilent fellow, who does no good, and often works much harm. If, then, you could banish him altogether, it would greatly restore me; and I don't think I should weep if he were slain outright. What say you, Pilgrim, will you be my champion in this matter?"

Pilgrim. — "I will, Madam, and do my best."

The Lady C. L. — "Thanks, brave sir; and success attend you. Rest you here this night, and to-morrow we will seek out this monster."

With these words the audience was ended. Pilgrim was shown to an apartment where the softness of the couch would have brought sleep to one to whom it was less welcome than it was to his wearied limbs.

: ART. VI.—DUNNING.

MUCH less is known, at least familiarly known, concerning Dunning than almost any other of our eminent lawyers who flourished in the last century. This arises chiefly from the circumstance of his never having reached the highest honours of the profession, and having died at an age far from advanced. Yet he was a person of the very first-rate eminence at the bar, and one of the few lawyers who fully sustained in Parliament his great forensic reputation.

John Dunning (called by an absurd mistake Joseph through all the volumes of the Parliamentary History) was born at Ashburton, in the county of Devon, in October, 1731, the son of a very respectable attorney who practised there and lived to a great age, having only predeceased his son by three years. By him the youth was placed in his office when only thirteen years old, as an articled clerk; but Sir Thomas Clarke, Master of the Rolls, being the old gentleman's client, had observed Dunning's early aptitude for business, and advised his studying for the bar. He was accordingly entered of the Middle Temple, and called in July, 1756.

He went the western circuit for some years without success; but having accidentally been employed by the East India Company in preparing their answer to the Dutch Memorial, and become thus introduced to professional connexions, he was intrusted with the argument in the case of *Combe v. Pitt*, in 1763, and was soon after retained as of counsel for Wilkes (with whom he had also some private intimacy), in the questions arising out of the North Briton. In 1765 he argued the case of General Warrants, to which Wilkes's case gave rise. His talents for business, his extraordinary acuteness, his inexhaustible resources as an advocate, his steady and impressive, though not finished, still less polished eloquence, above all, his command of legal matters, and readiness in dealing with legal topics, shone forth on these

great occasions in such a manner as fully established his reputation in Westminster Hall. His business rapidly increased, and after being chosen Recorder of Bristol, he was, in January, 1768, appointed Solicitor General under Lord Shelburne's first administration, through whose patronage he was soon after chosen member for Calne, and he continued in Parliament member for that borough until, a short time before his death, he was called up to the House of Lords.

From the situation of Solicitor General he retired on the change of ministry in 1779, nor did he ever after hold office till in Lord Shelburne's second administration he was made Chancellor of the Duchy of Lancaster, and for life; the Crown having an undoubted right so to confer that office, which only an address of the House of Commons, in 1807, prevented Mr. Perceval from holding by the like tenure. The story told in some works, as in the Penny Cyclopædia, of his having also received a pension of 4000*l.* a-year, is utterly without foundation, and may also be pronounced impossible to be true. They who have for this pension assailed him with unmeasured violence have added, to prove how inexcusable such rapacity was, that he had realised in the profession of the bar a fortune of 180,000*l.*—a statement much more near the truth; for he left a very considerable fortune, most honourably made; nor was he, except for little more than three years of his life, in the receipt of any official salary; and, on quitting the bar, for a comparatively small place, he gave up a very large income. When he took office at the beginning of 1768 he had only a stuff gown, and on quitting it two years after, he retired behind the bar. Lord Mansfield, on seeing him, there addressed the court, and said that, from respect for the office he had filled, and for his high station in the business of the profession, he should call upon him to move after the King's Counsel, the Sergeants, and the Recorder of London. The two senior stuff gowns, on rising, said that it had been the intention of the bar to make the same proposition to his Lordship, and that it met the general wishes of the profession. Dunning always proudly refused a silk gown, and continued till he left the bar to sit behind it. We may add, that when the personal hatred

and caprice of a tyrannical prince, defeated by Messrs. Brougham and Denman in his conspiracy against his wife, had, seconded by Lord Eldon's timidity, deprived them of their rank in 1821, a proposal was on their circuits entertained of a similar kind, but rejected. On the northern circuit it was understood to have failed through the ill-humour of Sergeant Hullock.

Although Dunning was but a short time of his parliamentary career in office, he was a constant and prominent debater during the fourteen years that he sat in Parliament, and he was a steady adherent of the Whig party; but of the Shelburne or Lansdowne section of that body. For its chief he had a sincere respect and affection, grounded not more on his gratitude for acts of kindness, than on a just estimate of his great capacity for affairs, his extensive knowledge, and his firmness and spirit rarely equalled, never surpassed. For Lord Shelburne was a statesman of the Chatham school, and while he took the largest views of the public interests, was wholly ignorant of what either fear or vacillation meant. No man has been more the victim of personal spleen and factious calumny; nor can we fail to recollect that his love of letters and science, his patronage of their cultivators, his keen relish for their society, formed always one of the main objects of Whig satire¹—any more than we can forget that the deep-rooted aristocratic prejudices, the coterie spirit, the family system of rule, which lost Mr. Pitt to their camp when Lord John Cavendish was preferred to him as Chancellor of the Exchequer, and he, the first man of the day after Mr. Fox, could only be offered a subordinate station, found a marked contrast in Lord Shelburne, who, on assuming the Premiership, at once made him his second in command, and leader of the House of Commons.

The remains of Dunning's speeches which are preserved give us a very exalted idea of his powers in debate. They are lively, terse, full of point, never losing sight of the subject in hand, generally most argumentative, occasionally

¹ Beside the Rolliad Papers, see Lee's violent personal abuse in debate, 1783, of which this very liberal topic forms a principal ingredient.

dealing in powerful invective. The courage of his friend and leader he amply shared. No man daily practising before Lord Mansfield could be expected, as a matter of course, to assail that great judge in Parliament with unmeasured vehemence, close upon offensive personality. But Dunning cared not for any such considerations and etiquettes. Had he been a mere politician who never entered Westminster Hall, instead of the first leader in the Court of King's Bench, he could not have dealt more unsparingly his blows at the illustrious chief justice, when he deemed his judicial proceedings hostile to the liberties of the subject. Take an instance from the debate, 6th December, 1780, upon Sergeant Glynn's motion on the administration of justice, as connected with the rights of jurors. After showing that Lord Mansfield's doctrines could be traced to the worst names in our judicial annals — to Scroggs — to Alibone — to Jeffries — and illustrating this position at length, he proceeds to show how far his Lordship had improved upon his great models, — what additions he had made to their tenets. He charges the Chief Justice with craft, with indirect contrivance, with seducing advocates by "hints, looks, half-words to abstain from bringing things forward, insinuating that it would be injurious to their clients — but really because they would hamper himself in his pursuit of a conviction." — "Herein," he says, "Lord Mansfield far surpassed the old performers, who, whatever were their doctrines, declared them from the beginning and throughout the trial, and did not by skulking and concealment filch a conviction from the jury, but committed a bold robbery on public justice in face of the laws and of the defendants."

It must be admitted that *he*, too, could face Lord Mansfield openly, and beard him on his bench. A well-known anecdote, recording at once his wit and his boldness, is often mentioned in Westminster Hall. On some difference arising on a point of law, his Lordship was pleased to say, "Then, Mr. Dunning, I may burn my books." — "Better read them," was the reply.

On legislative matters Dunning did not appear to be at all in advance of his age. But he was not behind the other great party leaders, his fellows. A great debater, far sur-

passing Wedderburne, if far less graceful; a man of real wit, and bringing his wit to bear on the argument; in close reasoning, second to no one; in sarcastic invective, superior to most men; a singularly bold spirit withal; he had all the old notions of regarding our Constitution as perfect even in the faults which it retained of the most barbarous times, just as Dean Swift, with all his Tory prejudices, declared himself for the old Gothic institutions of annual parliaments and universal suffrage; and as Mr. Fox could see no wisdom beyond the Whig catalogue of idols and of grievances handed down from our ancestors, the Whig leaders who preceded him. Mr. Burke was, indeed, the only statesman who appeared as at all before his age. He would hardly have expressed himself as Dunning did on appeal of murder, though he hardly gave it up. "I rise," said Dunning (29th April, 1774), "in defence of one of the pillars of our Constitution, the appeal of murder;" and he protested against "abandoning our old Gothic Constitution, and substituting a new Macaroni one in its place." Let us felicitate ourselves that we have outlived these days, and have survived to a period when the merest schoolboys in legislation would be ashamed of such notions—few even entertaining them, none daring to give them vent.

If Dunning was distinguished in Parliament beyond the lot of most lawyers, his principal theatre was Westminster Hall. There his fame was great. Together with the points of Wallace, the arguments of Dunning were the subject of admiration long and long after they had both been removed from this passing scene. In manner, neither was graceful; Wallace much less than Dunning: but Dunning was uncouth in his person, and little gifted with a sonorous voice or even a clear utterance. It was only when he became warmed with his subject that the torrent of argument and illustration poured. Against Wallace it was generally his lot to be pitted; even in Parliament, as far as Wallace's very marked inferiority there admitted of any contest; for he was very inferior indeed in debate, and only spoke when official necessity compelled him. These two rivals met on an occasion of melancholy interest, just before their decease. They were

both travelling in May, 1783, on the Bath road; Wallace was proceeding on his way to Clifton for his health; Dunning, broken by the loss of his eldest son, which he never recovered, was coming to town from Bristol, where he had been to hold, for the last time, the sessions as recorder. They met at Bagshot, and by tacit consent repaired to the same chamber, where they reposed upon two sofas, placed opposite each other, and held for a space some friendly conversation, probably turning upon former times and their present exhausted state. Wallace died in a few weeks, Dunning on the following August (1783), a few months after.

The books of course can never give a just idea of any advocate's powers as an arguer of cases, because all reports must greatly abridge the argument; all give it, or rather the heads of it, in the language of the reporter himself; and indeed little more is to be found than the points made and the authorities cited. This applies particularly to the reports before Durnford and East, with whom the less condensed and more prolix plan of reporting began. Burrows, Cowper, and Douglas are much shorter than their successors, and though, in point of condensation, the two latter are better reporters than any since, they give still less a representation of an arguer's manner of arguing than the somewhat unbearable profusion of after times. It is, however, with all these disadvantages, impossible to doubt that Dunning's argument in the case of *Combe v. Pitt* (3 Bur. 1423.), which first established his fame in Westminster Hall, was a performance of very great merit, though the point was of the most inconsiderable magnitude, viz. that a plea in abatement of another action brought in the same term, can only be supported by the date of its actual commencement being, *de facto*, prior. His arguments in the much more famous cases of *Doe v. Fonnereau* (2 Doug. 496.), and *Le Caux v. Eden* (2 Doug. 596.), appear to have been also of great ability. But in *Combe v. Pitt*, Lord Mansfield in a second argument being suggested, made answer that it was unnecessary, the first having been most satisfactory and full, with neither a word too much nor a word too little.

Dunning married, in 1780, the sister of the late Sir Francis Baring, and aunt of the present Lord Ashburton, who

on his creation in 1835, took the title of his uncle by marriage. Three of the letters annexed to this short statement were addressed to her, and one of them, on his way to hold his last sessions at Bristol, is marked on the back in her hand "*The last.*" They all evince a very amiable mind and feeling heart. Mr. Burke thus eulogised him at a period when hatred of all the Shelburne connexion had not as yet shut his eyes to real worth and sterling merit. After declaring his esteem for the man, he thus speaks of the lawyer:—"I am not afraid of offending a most learned body, and most jealous of its reputation for that learning, when I say he is the first of his profession. It is a point settled by those who settle every thing else, and I must add (what I am enabled to say from my own long and close observation) that there is not a man of any profession, or in any situation, of a more erect and independent spirit, of a more proud honour, or more manly mind, or more firm determined integrity."

When the fierce hatred of Lord Shelburne burst forth among the Whigs; when he was the object of constant and unsparing attacks, somewhat of their abuse extended to his eminent partisans; Colonel Barré's pension, and Lord Ashburton's grant for life of the duchy, were assailed; but no one ventured to question the purity of the latter's whole personal, political, or professional conduct. The carelessness of those who compiled the Parliamentary History of those days, and who called Mr. Dunning, Joseph during the whole of these volumes, makes the debates speak in one passage of a conversation upon Colonel Barré's and Lord Ashburton's pensions; whence the writers already alluded to have chosen to assume that the latter had, like the former, a pension of 4000*l.* a year; a thing utterly false. He had, by grant of the Crown, the place of Chancellor of Lancaster for life — a grant perfectly lawful, and which was a poor compensation for the loss of twice as large an income at the bar. There can hardly be produced a second instance of so scandalous an inattention to accuracy, on the part of persons who choose to fasten on the untarnished honour of illustrious names, charges of corruption and profligacy, and gross inconsistency, for which their own inexcusable inaccuracy and blunders are the only foundation.

ORIGINAL LETTERS OF MR. DUNNING.

To Sir William Meredith.

[No date, but about 1766 or 67.]

MY DEAR SIR,

For fear I should not have sufficiently explained myself last night on the subject you have kindly opened to me, allow me, as I am anxious to be thoroughly understood, to express to you my sense of it in this note. Let me repeat to you, then, that I feel myself much honoured and flattered by the favourable opinion which has procured me the intimation you have so obligingly communicated, as well as much indebted to you for the friendly part you have taken in it. With respect to a silk gown, it is what, at present at least, my ambition does not point at. I have every reason to be satisfied with my situation in my profession, and I am so most thoroughly. A seat in Parliament, upon the terms of independence with which I understand from you it is meant to be given (and upon any other, if I know myself, I would not accept a seat in heaven), is a most important object. It would alter, however, the line I am at present pursuing; whether to my advantage or otherwise, I have not sufficiently considered the subject to judge; but before I do this, or consult a friend about it, as I should wish to do, I think it behoves me, as an honest man, to beg that you will do me the favour to make known the circumstance which I mentioned to you with that view, that is, that I have the honour to live in a very unreserved friendship with Lord Shelburne. How far this is material, I protest to you with all sincerity, I do not know enough of his disposition or of that of Government towards each other, to form any judgment; but I should think myself very unworthy of the attention I am honoured with, if I thought of accepting a favour of this sort without disclosing a circumstance which there is the least reason to suppose might, if known, have prevented its being offered me.

If, on account of this explanation, or for any other reason, this matter should go no further, you may rest assured that, as you desired, it shall not be known from me that it has been thought of; and you will, I hope, believe me always,

Sincerely yours, J. D.

P. S. I go out of town to-morrow, return Monday morning, and will certainly dine with you unless you forbid me.

Ashburton, Tuesday, 5th December, 1780.

MY DEAR ELIZA,

Your children, if we should be blessed with any, will never know the endearments of a grandfather, as both he and we had fondly hoped they would. I continued my journey yesterday morning, as I wrote you from Exeter I intended, without waiting for day, and consequently without intelligence, which I find had been sent for me to your brother's. When I got hither, I found my father lying dead in one room, and I would, if I could, describe the emotion with which I was received by my sister in the next. Your feeling heart will better conceive it; but even that heart, soft as her own, will not do her justice, unless you recollect that, in addition to the common ties which bind a well-disposed child to a deserving parent, her sensibility was heightened by his having been, for so many years, the constant object of her unremitting tenderness, care, and attention. Nothing could be more useful than that care, more exemplary than that attention, to which I verily believe we are indebted for the last seven years of his life. This is a topic of consolation of which, I trust, she will be, by and by, more sensible. At present, though the worst has, in fact, delivered her from a fatigue which her weak frame and weaker spirits were ill calculated to support, she feels nothing in it but the total loss of a pleasure—that of administering to the infirmities of her parents—to which, from a very early period of her life, she has sacrificed every other. This new infliction has opened the ill-cured wound occasioned by the death of my poor mother, whom you never knew. If you had known my father as we knew him, it would have endeared him to you as much.

You could not fail to remark, during your short acquaintance, the patience with which he bore excruciating pain, and the cheerfulness which distinguished the short intervals. I have the satisfaction to find that an interval of ease preceded his death, and that he died in a state of perfect resignation, composure, and complacency.

Though he died so long since as Friday, before the fatal express which reached us Saturday night was half way on its journey, his countenance still wears a smile. My sister reproached herself with not having written to me in such terms as would have brought me here before the scene closed, imagining it would have shocked me less. I comforted her with an assurance that the only regret I felt on that account was that of not being at hand to help her to bear her share of it. I knew how much I was indebted to her for the kind-

ness of her motive in not alarming me before his medical assistants led her to think it necessary ; and I found a kind attention to you and to me had influenced my dear father to desire that I might not be sent for, till the rapid increase of his disorder made it no longer possible to do it in time. Till then he had, at times, pleased himself with looking forward to the usual recess from business, when he hoped to have seen us with less inconvenience to ourselves. I have the pleasure to hear that he frequently expressed himself happy in himself and in his family ; that he spoke of the addition you had made to it with perfect satisfaction, and particularly desired that his blessing might be conveyed to you. I know that you will join with us in loving and revering his memory. I believe no human heart was ever warmed with more of the milk of human kindness. In the course of so long a life, I never knew or heard of his saying or doing anything unkind upon any occasion or from any provocation. He has left us the most valuable of all patrimonies — nothing to blush at on his account, and nothing to wish for, but that, living and dying, his example may not be lost upon us.

The funeral is intended to be on Thursday, till when I can say nothing with certainty of our motions, but I shall hope to prevail with my sister to let me convey her to town, that she may profit by our mutual endeavours to console her. I have assured her (as I knew I might) of a wish on your part as fervent as my own that we may be able, in some degree, to repair the loss she has sustained by all the attentions in our power, and I beg you to second my endeavours to soothe her by a letter to herself, as well as to give me the satisfaction of knowing that I have not pained you more than I ought by giving vent to my own passion in imparting it to a bosom which has so good a title to demand its share of every thing that gives mine pain or pleasure.

My great-coat and pelisse kept me warm ; and I got hither without any new cold, or any other fatigue than what arose from the occasion of my journey. To learn (if you can tell me so with truth) that you are, as I am, as well as when we parted, will be the most acceptable intelligence that can be conveyed to,

My dear Eliza,

Your ever affectionate husband,

J. D.

Ashburton, Friday night, December, 1780.

I fear I distress my dear Eliza by my last letter, but my heart will naturally overflow to her. I have performed the last offices

to the remains of my dear father, and have hopes of removing my sister as soon as I can conveniently get away, which you will believe will be as soon as it can be. Accept my love, my best thanks, for your favours of Monday and Tuesday, and for your obliging assurance of an intention to write every night till we meet. Be assured that my return will be as regular as the course of the post will admit, which you know is, in effect, but three times a week, unless an occasion should arise to write between twelve at night and six in the morning.

My sister has a just sense of your kindness, which she wishes me to express in terms of affection and gratitude; and as you know my tender attachment to both, you will allow me to consider myself (and I promise myself great satisfaction in it) as a centre of union between two of the most amiable women I know in the world. In this way it is that I consider myself under the pressure of a misfortune that I find it difficult to deal with. Inevitable evils must be borne, but in instances like the present they will be felt. I have blotted out the 1st December from my calendar, and I should have done the same by the year, if I had not recollected the 31st March.

Adieu, my dear wife,

Ever yours,

J. D.

“*The last*,” written by Lady A. on the back.

Bristol, 12 o'clock, 3rd May, 1783.

MY DEAR ELIZA,

I send the enclosed to you to be forwarded immediately, lest if I sent it myself under its proper direction curiosity might tempt somebody or other to delay it, for the sake of looking into such a correspondence, and I send it open, that you may see how I am circumstanced, not having time to transcribe that part of it. You will read it and send it.

Though the business is of the sort I have represented, and the weather sufficiently warm, I have been less incommoded by it than I expected; and have no doubt but I shall return to you (whether Monday or Tuesday you will learn by the post of to-night) as well as when I left you.

Your letters, up to this night inclusive, have given me great satisfaction. A continuance of the same good accounts will be the best refreshment, under these labours, which can be received by

Your devoted husband,

A.

To Lord Shelburne.

MY DEAR LORD,

As your Lordship wished to be informed of what the Court might do in the business of Mr. Wilkes, I send this now to acquaint you that, pursuant to a notice he gave last night to the Solicitor of the Treasury, he surrendered to the sheriff this morning, and was brought into Court. His counsel moved that he might be bailed, contending that he was entitled to be so *ex debito justitiæ*, by the act of the 4 & 5 Will. 3. c. 18.; but the Court, after a long argument, were of opinion that a person outlawed after conviction in a criminal case was not entitled to the benefit of that act.

They then renewed their motion upon another ground — the discretionary power which the Court has to bail in all cases, arguing that Mr. W.'s conduct ought to satisfy the Court that there was no doubt of his appearing, to satisfy the demands of justice, whenever he should be required, which was the only end that ought to be proposed by his imprisonment; but, in answer to this, the Court said there was no instance of a person in custody after a conviction being bailed, without the consent of the prosecutor, and the Attorney-General not consenting to his being bailed, he was sent to the King's Bench prison.

The Attorney-General took occasion, from what was said of his being a public man that might have been taken, if he had pleased, long ago, to explain and justify his own conduct in not directing a writ of *capias ultagatum* to issue sooner, namely, that he relied on the notice he had given of his intention to appear the first day of the term, and thought it oppressive to use compulsion where it was not necessary. He will, I believe, be brought up again tomorrow, to assign his errors, that is, to state the grounds upon which he means to contend the outlawry ought to be reversed.

He has kept us in Court to this late hour, but I thought your Lordship would be glad of this account before I went to dinner.

I am, my Lord,

Ever faithfully yours,

J. DUNNING.

Temple, $\frac{1}{2}$ after 7, Wednesday Evening.

Spitchwich Park, 21st April, 1778.

MY DEAR LORD,

I have this day a letter from a friend of mine, whom I believe I need not name, in which he tells me that the appointments intended

for himself and his colleague are in such forwardness, that he supposes they will take place before he can hear from me, unless an embarrassment about the choice of the situations, which he means to claim, should prevail.

He continues to express a strong dislike of the appendage, as he calls it, to his appointment, and a regret of my absence, as wishing me to have communicated to your Lordship, and enforced his opinions about the offer which he supposes to have been made you, adding that he would go to you, or to B., or both, but that he feels it impossible to expect that you should take that confidence in his representations which he believes I do. I thought myself warranted, by what had passed between us, to assure him, in answer, that if he took the part of communicating anything he thought proper to your Lordship, he would find you not at all ill-disposed towards him; and I mention this to your Lordship, as thinking it not unfit, if anything of this sort should happen, that you should be so far prepared for it. If his ill humour should lead him to abandon the system, it would, in my judgment, put an end to it; and as things are circumstanced, without some such event, I see no end to it. National misfortune and disgrace do not appear to weaken it; and such appointments as I have been speaking of certainly carry an appearance, at least, of strength. I find I am likely to be detained at Bristol longer than I expected, but I hope to have the pleasure of finding your Lordship well in town towards the end of next week.

I am, my dear Lord,
Ever faithfully yours,

J. D.

Salisbury, 4 November, 1779.

MY DEAR LORD,

I should not have failed to make Bowood in my way to London, if I had left Devonshire in time; but being detained there till yesterday, I am obliged to take the direct road to be in town in season for the term. I have left Sir Charles Hardy with thirty-eight ships of the line in Torbay. Where they are to go, or what they are to do next, is, I understand, as little known in the fleet as it is to me what we are to do when we meet the latter end of this month. I have not thought it right to be absent from my cottage long enough to see or know any thing of the D. of R., or any body that could give me information on the subject of Irish or English politics. The newspaper account of arrangements that have taken and are taking place, leads me to suppose that you have seen no-

thing of your late neighbour at Bath, and that I am to find things in town pretty much as I left them. If so, can we do better than *cultiver notre jardin*, your Lordship a very pleasant one at B., your humble servant one that will afford him sufficient employment, though not of a kind quite so pleasant, at Westminster. How long we may be permitted to enjoy either is uncertain; but we shall lose nothing by keeping out of a bustle, if the going into it will not help us to preserve them. If your Lordship has any commands I can execute in town, there they will find me in readiness to obey them.

I am, my dear Lord,
Ever faithfully yours,

J. D.

The following letter, dated the 3d April, 1780, relates evidently to the return of Mr. Dunning from his marriage excursion, and also to the duel fought by Lord Shelburne on the 22d March, with Colonel Fullarton, and the wound which his Lordship received. The dispute arose on Lord Shelburne's remarking, in the House of Lords, that the corps raised by the colonel might very possibly be employed against the liberties of the country; whereupon that gentleman took offence, and used harsh language in the Commons; but not satisfied with that, he sent the earl a message. This invitation was accepted, as all explanation was very peremptorily and somewhat contemptuously refused. It seems the same tone was preserved in the field; for Lord S. seeing the colonel and his second, a Scotch peer, asked "which of the two gentlemen it was that he had to meet." The colonel was a very unknown personage, and filled no space in any eyes but his own. On the second fire he wounded his adversary, who, when accosted by his second, Lord Frederick Cavendish, refused to give up his pistol, saying "he had not fired it." He took his place again, and fired in the air. The adverse second then asked Lord S. if he would now retract or explain; but he said the matter had taken a different turn, and explanation was out of the question. However, he added, that he was ready to go on, "if the gentleman wished to continue,"—which was of course declined. Certainly no man ever behaved with greater courage or coolness in any

circumstances—as all might expect who knew the fearless nature of the man—and it argued no little vanity in “the gentleman” to expect he ever should obtain any other satisfaction than a fight, which he probably thought it worth his while to have, as a rising young political dealer.

When the Earl’s wound was known in the city, the corporation sent a respectful message to inquire after his safety—“highly endangered in consequence of his upright and spirited conduct in Parliament;” expressing themselves “anxious for the preservation of the valuable life of so true a friend of the people, and defender of the liberties of Englishmen.” The late Mr. Bentham, a friend of Lord Shelburne, always regarded him in this light, and was wont to describe him “as the only minister he had ever known who did not fear the people.”

Putney, Monday morning, 11 o’clock, April 3. 1780.

MY DEAR LORD,

Your porter will, I fear, give but a bad impression of the future regularity of my family to his fellow-servants, when he comes to explain to them how it has happened that he has not been dispatched earlier, which I find he was very impatient to be; and it is in justice to him that I give this note the date it bears.

The companion of my journey, which ended here last night, and who will, I trust, be the companion of my journey through life, feels as she ought the honour your note so obligingly encourages her to hope for in Lady Shelburne’s protection; and is impressed, as becomes her, with the respect due to Lady Shelburne’s character. She joins with me in very sincere congratulations on your Lordship’s safety, and rejoices in this signal proof that Providence has not yet abandoned this unhappy country.

I should very much lament the loss of the letter your Lordship had the goodness to think of writing to me, under circumstances which added so much to its value, if I had not learnt from Colonel Barré that it was not to be sent to me, but in an event which I have the satisfaction to see the people at large show they have virtue enough to have learnt, with as much indignation as I should have done. Your Lordship will allow me to express the additional satisfaction your letter to Wilts has given me, by the proof it affords that your recovery is complete.

I am in hopes of seeing Barré here soon, who, I fear, will not

so readily admit, as your Lordship will, the apology I am obliged to make for being totally unprepared on every other subject, by the attention I have thought due to one.

I am, my dear Lord,
Ever truly and faithfully yours,
J. DUNNING.

MY DEAR LORD,

It occurred to me, as I came home, to write a few lines more (as soon as I could disengage myself) to suggest for your consideration as a short exordium of your protest. Some matter of this sort seems to me proper to precede what you have written, if upon consideration you should incline to such a measure. You will find it on the other side; but it is intended merely as a hint to compleat the sketch of what had occurred to me. Your Lordship and Colonel B. will lick it into form:—

Dissentient —

Because we conceive a militia force gradually increasing, and at length amounting to 40,000 men in arms, raised without the authority of the state, though from the purest motives and with the best intentions, was a circumstance so singular, and, for obvious reasons, so dangerous, as to have merited the constant attention of every minister who would desire to be thought attentive to any thing. If it proceeded from the necessity of providing for the defence of Ireland against our common enemies, it was surely highly criminal in ministers to have neglected the proper means of providing for the defence of that kingdom, whereby so irregular a measure would have been made unnecessary. If it is supposed to have had in view the support of a claim of that kingdom to redress of grievances, it is still more criminal in ministers not to have prevented it by a timely inquiry into the nature of those grievances, and a reasonable provision for the proper redress of them.

To Lord Shelburne.

April, 1782.

MY DEAR LORD,

I have always given myself credit enough with your Lordship to have it believed, and not imputed to a self-affectation, that, instead of desiring, I have a dread of any office of any sort, proceeding from a perfect satisfaction with my present situation, an apprehension that I cannot change it with credit to myself, or

advantage to my friends. That as far as such talents as mine can be of any use, they may be better employed where I am. Your Lordship's authority has silenced, though not satisfied me, as to a Parliamentary office, for which the habits of my life must have gone farther towards qualifying me, than for any other.

[Lady Ashburton, the widow, copied thus far from the rough draft kept by Lord A., but she could not decipher the rest. It relates to his acceptance of the Duchy.]

ART. VII.—ON MARRIAGE WITH A DECEASED WIFE'S SISTER.

GENERAL usage is, to some extent at least, evidence of the law. What all men do without any hindrance, may be presumed to be done under legal sanction. What none do, is either impossible, against every interest, or unlawful. What a very few do, with the express disapproval of the rest, bears the first impress of unlawfulness stamped upon it. The amount of weight to be assigned to such general evidence of opinion will depend in each instance upon the degree of interest which we have in ascertaining the law. On a question which is purely indifferent to society at large, its opinion will command very little respect. On a point which materially affects an important section of the community, the fact that it has uniformly acted on a particular construction of the law is not unimportant. Lastly, if all men are concerned in the right understanding of the question; if it be a law which descends into their most intimate relations, presides over their hearths, and regulates their dearest interests; if that law has ever been received on one interpretation only, and the infringers of it have ever incurred the odium of public opinion, that heaviest of pains and penalties;—then, so Catholic an interpretation as this,—*emphatically, ubique, ab omnibus, et in omni tempore*, deserves our very best attention; and if it be not sufficient to decide the question, should make us pause at least before we come to a contrary conclusion. “It has been sometimes said,”

observed Lord Ellenborough¹, "*communis error facit jus* ; but I say, *communis opinio* is evidence of what the law is ; — not where it is an opinion merely speculative and theoretical, floating in the minds of persons, but where it has been made the groundwork and substratum of practice."

If there be one question on which, more than any other, the voice of public opinion has a right to be heard, it is that of Marriage. For many purposes, and those the more practical ones, it should be final. To the lawyer it has the recommendation of coming from those whose interest forbids their indifference. If, on a particular point in the law of marriage, it should appear that that point has at times been agitated and questioned by a few, but instantly affirmed by the community at large ; if public opinion has ratified its first impression by appeals to associations the most endearing, and injunctions the most sacred ; if the dicta of lawyers themselves have not been wanting, and the traditions of Westminster Hall have been found to range with the sentiments of laymen ; if, for two centuries, no serious question has been made of the validity of the law, even by those who have dared to disregard it ; then, we assert, that more than a *primâ facie* presumption has been created in its favour, and that it rests with those who dispute such a law to account, in the first instance, for a coincidence of particulars so powerfully indicative of its validity ; and to explain circumstances, which, if not in themselves expressly conclusive against them, render their chances of success on the main question next to hopeless.

Such are the observations which naturally suggest themselves when the question of marriage with a deceased wife's sister is once more brought before the public. Nor are they rendered less in point by the form in which it now appears. Often as the *expediency* of permitting that marriage has been harangued upon at meetings, argued in pamphlets, and debated in clubs, we confess to have been somewhat startled when, for the first time, we heard its *legality* seriously asserted, and that in a court of law. Considering that this very point was decided in an elaborate judgment of Chief

¹ 3 M. & S. 396.

Justice Vaughan's, in the 25th of Charles II.¹; that a series of subsequent decisions² have extended the prohibition to the *wife's sister's daughter*, and that the only modern statute on the subject (5 & 6 W. 4. c. 54.) has strengthened the prohibition by making that void which before was only voidable; we confess to have felt no inclination to receive with patience any new lights on the subject. It seems, however, that the case in Vaughan, and consequently, we presume, the other cases, were decided "in mistake;"—that no notice was there taken of a certain statute, which, it is alleged, would have qualified the argument, and that the law must be reviewed. The occasion, indeed, for such a review might have been better chosen; since the point has been taken for the purpose of fixing with the guilt of bigamy an individual who, on the received construction of the law, would have been entitled to an acquittal.

James Chadwick was indicted at Liverpool³, last winter assizes, for bigamy. The counsel for the prosecution, in opening the case, at once stated that he anticipated no difficulty in proving a *prima facie* case of bigamy against the prisoner, but that he understood a defence of a peculiar nature was intended to be relied upon; that defence being, that prior to either of the two marriages, which by themselves would have constituted the bigamy, the sister of the woman with whom the first of those marriages was contracted had intermarried with the prisoner, and had died shortly afterwards. It would be asserted, he said, that the intermediate marriage, being with the sister of the prisoner's first wife, was null by law, and that consequently no bigamy was committed by the marriage with the last. He was prepared, however, to contend that the middle marriage was good and subsisting. Perhaps the more regular course would have been to have postponed any argument on the supposed validity of that marriage until proof of it had been tendered on the other side, and then to have taken an objection as to

¹ Hill v. Good, Vaughan, 302.

² Wortley v. Watkinson, (31 Car. 2.), 2 Lev. 254.; Clement v. Beard (11 W. 3.), 5 Mod. 448.; Snowley v. Nursey, (2 Lutw. 1075.) See also Remington's case, cited in Howard v. Bartlett, Hob. 254.

³ See *The Times*, 12th December, 1846.

the relevancy of such evidence in the usual way. But disdaining that course, and obviously impatient for the fray, the learned gentleman addressed himself to the point thus raised by anticipation on these facts, and plunged at once into an argument which, we are bound to say, lost nothing of its effect by the manner in which it was handled. The Court, however, very properly stepped in to insist on proof of all the facts, before consenting to embark on the law; the material points were accordingly proved; and after a more learned and lengthened argument than is usually heard on circuit, a special verdict was found by the jury, on which the Court, unmoved by the ingenuity of the prosecution, acquitted the prisoner.

This case may or may not be argued hereafter before a higher tribunal. It will be open to the Crown to bring a writ of error on the sentence thus pronounced, and so to exhume, for the first time these two centuries, the very important question of the validity of a marriage with a deceased wife's sister. And we should deem ill of those who advise for the Crown in this matter, were they to suffer it to rest in its present condition. A question so momentous should not, by argument, without formal judgment thereon, be converted into a moot point. They have raised a spirit, and now they must lay it. A more solemn consideration of the subject may indeed be anticipated; but, in the mean while, we propose ourselves to examine it, and we doubt not to be enabled to convince our readers that the received opinion squares with the true construction of the law.

The statute 5 & 6 Will. 4. c. 54., commonly called Lord Lyndhurst's Marriage Act, made a most important alteration in the law of marriages. Before that statute, no marriage had between degrees of even the closest consanguinity was for that reason void.¹ It required the sentence of an Ecclesiastical Court, on a suit of nullity, to avoid such a marriage, which was therefore said by lawyers to be merely voidable. If no such suit were instituted during the joint lifetime of the parties, then, generally speaking, the marriage enured as good and valid to all intents, and the issue were legitimate.

¹ Reg. v. The Inhabitants of Wye, 7 A. & E. 771.

The uncertainty of this state of things, and the prolonged pendency of the rights of collateral parties, by the conditional sanction which the law gave to such marriages, however incestuous, added to the circumstance that those rights were forever defeated if the marriage were not brought by suit before a Court Christian, warranted on the most public considerations the interference of the legislature by this enactment. Be that as it may, it is upon the terms therein used that the present argument hinges. The statute, as far as we are now concerned with it, is as follows:—

“Whereas marriages with persons within the prohibited degrees are voidable only by sentence of the Ecclesiastical Court, pronounced during the lifetime of both the parties thereto, and it is unreasonable that the state and condition of the children of marriages between persons within the prohibited degrees of affinity should remain unsettled during so long a period, and it is fitting that all marriages which may hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity should be *ipso facto* void, and not merely voidable.”

Section 2. enacts, “That all marriages which shall hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity shall be absolutely null and void, to all intents and purposes whatsoever.”

Now the only question to be answered in construing this clause is, what are “*The prohibited degrees of consanguinity or affinity?*” And we may here at once state that it is upon this question that the argument entirely turns. The one side, following the popular idea, say that the expression, “the prohibited degrees,” refers to the prohibitions of the canon law, and must be understood to include all degrees within which a marriage might have been annulled by the ecclesiastical courts, and therefore the marriage in question; —the other, that this expression being used in an enactment of Parliament, must be intended to relate to some degrees of consanguinity or affinity, within which marriage is prohibited by some *statute of the realm* or at *common law*, and must be construed entirely independently of any canon law, or of any system whatever except the laws and customs of the realm of England. The language of Parliament, it is said, knows

nothing of any prohibitions, except those which itself, or the common law impose; nor would it be more insensible to interpret this clause, as relating to the prohibitions of the Spanish law, or of the court of Rome, than to apply it to those of the ecclesiastical courts in England, whose jurisdiction, doubtless, continues for certain purposes, but whose principles and proceedings, as a general rule, the law of England utterly ignores. This last hypothesis derives some colour from the circumstance that there exists, in one of the unrepealed statutes of the reign of Henry VIII., certain prohibitions of marriage within particular degrees, upon which it is said the clause of the statute of William IV. may very well operate.

Having stated the hostile interpretations which are thus placed upon the statute, we will add our own conviction that the statute itself decides conclusively against the latter one. The expression, "the prohibited degrees," is not ambiguous if the whole statute be read together, and if the mischief be kept in view which it was intended to remedy. By referring to the preamble for the mischief there disclosed, it will be found to be a very simple one. The validity of marriages within "the prohibited degrees" is said to depend upon the contingency of such marriages being annulled by the ecclesiastical courts; for avoiding which uncertainty the statute enacts that they shall be *ipso facto* void, without the need of such sentence. Who can doubt that the marriages within "the prohibited degrees," mentioned in the enacting part, are identical with the marriages within "the prohibited degrees" referred to in the preamble; and that this enactment has therefore in terms applied itself to all marriages which before its passing were capable of being made void by sentence¹ of the ecclesiastical courts, and consequently to ALL marriages prohibited by the canon law as administered in those courts?

We can willingly afford to admit so much of the opposite argument as imports that the canon law, speaking generally, is no part of the laws and customs of the realm; and that, therefore, the prohibitions here pointed at must be intended,

¹ Subject of course to the revision of the superior courts by prohibition.

prima facie, to mean certain statutory, or legal prohibitions ; — but will our opponents for a moment contend that it is not competent for the legislature, by express enactment, to apply its remedial powers exclusively to the canon law, or to any other peculiar jurisprudence in force in England, and to give to the law, thus as it were by its own hand improved, all the universality and binding effect to all intents, which any other statute undoubtedly possesses? And this being conceded, does it not clearly result, from a reasonable construction of the statute, that “ the prohibited degrees ” here pointed at, are the degrees prohibited by the canon law, and that since the operation of the statute, all marriages within those degrees are *ipso facto* void, to all intents and purposes whatsoever? We have been induced to labour this point the more, because if it be once conceded, all argument ceases. The canon law prohibitions, as of course our readers are aware, include the case before us, which would consequently, by the enactment of William IV. be a void marriage. It must not be imagined, however, that we have disposed so easily of the question. It will be our duty, on the contrary, to follow the advocates of the legality of the marriage, who, in defiance of the rules of construction which we have ventured to point out, give the go-by, as it were, to this statute, and remit us at once to the state of the statute law before its enactment, for the solution of the question, which to them is the only material one ; — was this, *according to the statute law of England*, a voidable marriage before the 5th & 6th William IV.?

And here we must warn our readers that the inquiry becomes slightly complicated. We are thrown upon a variety of statutes, some partially, others wholly repealed ; some again in part or wholly revived ; others, said to be brought in by a side-wind of references ; the point to be decided being, which of these statutes was in force in the year 1835, and what is the true construction of such statute? For ourselves, we feel quite confident, that even here our opponents must be foiled ; and we follow them, howbeit with reluctance, yet with no misgivings, into the intricate inquiry.

We shall found our proposed investigation upon the assumption, that by the common law no marriages whatever are prohibited ; or, at all events, those only which are mani-

festly against God's law. Until the period of the Reformation, the spiritual courts held exclusive and uncontrolled jurisdiction in all cases of matrimony; deciding them on the rules of the canon law alone, and not only giving validity to the papal restrictions between kindreds of even the seventh degree¹, but admitting, as avoidances of those restrictions, the dispensations and licenses of the court of Rome. The Courts of Westminster exercised no common law prohibitory jurisdiction in these matters over the ecclesiastical courts, however absurd the sentence might have been. We do not stay to inquire whether it might or might not be true as a matter of fact, that by the common law itself, apart from any statute, marriages contracted against God's law were invalid. Some of the statutes we are about to examine undoubtedly contain declaratory clauses to that effect; but, practically, the inquiry would be futile, because the doctrine of the superior courts at this time was, that the *interpretation* of the law of God was the province of the Spiritual Courts, and therefore the allegation, that the latter were misapplying that law would have been then no ground for a prohibition.²

The disagreement which arose between Henry VIII. and Clement VII., on the subject of the divorce of the former from Catherine of Arragon, was the first symptom of a change in the law. The English king, whose passion for Anne Boleyn had as yet worked no reformation in his religious creed, would have been content, at first, to have been divorced by pontifical sentence; indeed, during seven years of negotiation and intrigue that was his avowed object. But the grounds of divorce which he urged were some of them from the first derogatory to the dispensing power, and therefore adverse, *pro tanto*, to the papacy. The marriage of persons within such near affinity as exists between a man and his brother's widow was, it was argued, against God's law, and therefore indispensable; the Bull of Pope Julius II., dispensing with the impediment in the case of Henry and Catherine, was said to be consequently void. The political

¹ It seems doubtful whether the canonical prohibitions in England extended anciently to the fifth or the seventh degrees of consanguinity and affinity. See Reeves' Hist. English Law, vol. iv. pp. 58. 220. notes.

² Harrison v. Burwell, Vaughan, 212, 13.

perplexities which then trammelled Clement were of themselves sufficiently embarrassing, without compelling us to assign such considerations as a reason for his vacillation. The plot thickened. The cardinals, Wolsey and Campeggio, appointed by the pope to hear the suit and adjudicate thereon, suddenly adjourned a commission which had been throughout merely a device to amuse the king. The cause thereupon was evoked to Rome, where, doubtless, for any intention which that court had to settle it, it might still be pending. Disgusted with these delays, Henry caused Cranmer to hold an inquisition upon the marriage in England. A sentence of divorce was at length formally pronounced by the archbishop, and the king was united to Anne Boleyn. The failure of Francis I. to effect a reconciliation between Henry and Clement only confirmed an enmity which these proceedings had sufficiently established. The Parliament conferred on Henry the title of supreme Head of the Church of England; and in the August following the king was excommunicated.

It was in the midst of these foreboding events that the statute 25 H. 8. c. 22. (the earliest enactment that concerns our subject) was passed by the legislature. The dispositions of the royal mind are an index to its meaning, and they were of a mixed description. The king's first object was to confirm the divorce between himself and Catherine, so as to legalize his alliance with Anne Boleyn; his second, doubtless, that this should be done on grounds wholly apart from the procedure of the Papal Courts, so as to pave the way for a more total annihilation of their authority. Accordingly, this statute, while it solemnly confirms the sentence of Archbishop Cranmer, is totally silent as to the Bull of Julius II.; the impeachment of which, whether for misrecital of the inducements to its publication, or the minority of the consenting parties, had theretofore constituted half the arguments against the marriage. To invalidate the instrument on such grounds might seem like admitting its *primâ facie* authority¹; and

¹ Cranmer's sentence of divorce, given at large in Lord Herbert's *Life of Henry VIII.* (Kennett's *Hist. of England*, vol. ii. p. 163.) is equally silent on the subject of the Bull.

therefore the enactment is based exclusively on the proposition, that the marriage between Catherine and Prince Arthur having being consummated, her subsequent marriage with the king "should be definitely, clearly, and absolutely declared, deemed, and adjudged to be against the laws of Almighty God," and consequently, "utterly void and annihilated." To fortify this reasoning, there was added a clause, intended to be declaratory of the common law; which, though afterwards repealed with the rest of the statute, was re-enacted in terms in the repealing act, and now stands, as we hope to show, in full force on the statute book. This section greatly concerns our present inquiry, and is as follows:—

Section 3. "And, furthermore, since many inconveniences have fallen, as well in this realm as others, by reason of marrying within the degrees of marriage prohibited by God's law; That is to say:—

"The son to marry the mother or the stepmother;

"The brother the sister;

"The father his son's daughter,

"Or his daughter's daughter;

"Or the son to marry the daughter of his father procreate and born by his stepmother;

"Or the son to marry his aunt, being his father's or mother's sister,

"Or to marry his uncle's wife;

"Or the father to marry his son's wife;

"Or the brother to marry his brother's wife;

"OR ANY MAN TO MARRY his wife's daughter,

"Or his wife's son's daughter,

"Or his wife's daughter's daughter,

"Or HIS WIFE'S SISTER.

Section 4. "That no person shall from henceforth marry within the said degrees afore rehearsed, what pretence soever shall be made to the contrary thereof." All separations between these degrees are confirmed; and the children of such marriages are declared illegitimate.

Such was the purport of this important statute, which seemed for ever to settle the long-pending question of the king's marriage, and to define with accuracy the prohibited

degrees. But with a king so fickle in his affections, and a Parliament so subservient to his caprices, no question could be considered settled. Within three years of her coronation, Anne Boleyn laid her head upon the block, and the dignity and perils of her station devolved upon Jane Seymour. This third chapter of the king's matrimonial history has its significant transcript among the statutes at large. The statute 28 H. 8. c. 7.¹ entitled "an act concerning the succession," having repealed *in toto* the 25 H. 8. c. 22., again makes void the marriage with Catherine², associating with it, on this occasion, for reasons less potent the king's marriage with Anne Boleyn. It then settles the succession on Henry's issue by Jane, and re-enacts, in terms identical, the prohibitory clauses which we have already quoted.

These clauses, therefore, being still deemed collaterally requisite to ensure the validity of Catherine's divorce, and which expressly included the case of a wife's sister, were thus continued in the statute book. In a subsequent enactment of the same session they were alluded to in a manner which the tenor of our argument renders it necessary for us to explain.

The vacillating policy of Clement, the fatal results of which were now seen in the hopeless revolt of the British crown, had by this time been sufficiently repented of by the court of Rome. Various overtures for reconciliation had been made in Clement's lifetime, and peremptorily rejected by Henry. Paul III. who, on Clement's death succeeded to the pontificate, renewed these offers, which he was in a position to couch in terms sedulously disclamatory of the motives of his predecessor. The occasion appeared favourable to his hopes; since Anne's execution and Catherine's recent death had removed the causes of the original rupture.

¹ The title only of this act is printed in the ordinary editions of the statutes. It will be found, however, at large in the edition of the statutes printed by the Record Commissioners in 1817, vol. iii.

² By 28 H. 8. c. 7. the issue of Catherine (*viz.* the Princess Mary) is declared illegitimate; — a declaration not to be found in 25 H. 8. c. 22. The settlement clauses of the former limit the Crown, in default of direct issue, to the king's appointees by letters patent under the Great Seal. The latter statute limits it, in the like default, to the king's right heirs.

Soon after the enactment of the last act of succession¹ the message of peace arrived; but, like every former communication from Rome, it only served to provoke from the implacable Henry fresh demonstrations of his wrath. His obedient Parliament instantly passed two acts, the one for utterly abolishing the papal power; — the other, 28 H. 8. c. 16., with which we are now concerned, and of which the title is as follows: — “A provision for dispensations and licenses heretofore obtained from the see of Rome.” By this last statute, the preamble of which is solely directed against the Pope’s usurped authority by licenses and other instruments, all bulls, breves, faculties and dispensations are made null and void. To the annulling clause, however, (sect. 2.) is appended the following proviso: — “Yet notwithstanding at the most humble petition and intercession of the Lords Spiritual and Temporal, and the Commons in this present Parliament assembled, it may please the king’s majesty of his most gracious benignity, goodness, and blessed disposition, that it may be enacted by authority of this Parliament, That all marriages had and solemnized within this realm, or in any other the king’s dominions, before the 3d day of November, in the 25th year of the king’s reign, whereof there is no divorce or separation had by the ecclesiastical laws of this realm, and which marriages be not prohibited by God’s law, limited and declared in the act made in this present Parliament for the establishment of the king’s succession, or otherwise by Holy Scripture, shall be by authority of this present Parliament good, lawful and effectual.”

Natural equity seemed to require this proviso to be annexed to a clause which, by itself, would have had the unjust operation of an *ex post facto* law. Until the rupture with Rome, marriages had been accustomed to be contracted under canonical dispensations, which were frequent in an exact proportion to the extensive prohibitions of the Pontificate. Had the second clause stood alone, all such marriages, as they depended for their validity on these dispensations, would have been made void, however lawful their inception and long their continuance. Accordingly, the proviso we have quoted

¹ Parliamentary History, vol. iii. p. 130.

was obviously enacted for the protection of such of them as having been contracted previously to the 25 H. 8. c. 22.¹ were in violation of none of the prohibitions in that enactment contained; prohibitions which the legislature clearly regarded as at all times indispensable. The 25 H. 8. c. 22. (re-enacted for this purpose by the 28 H. 8. c. 7.), by first exactly defining the prohibitions recognised by the English law, rendered unnecessary all dispensations without the degrees there specified, and made dispensations within them merely void. Consequently, no injustice could flow from enacting the nullity of all papal interferences with the last mentioned restrictions. In this sense, we read a clause on which, however, as we shall presently show, a different construction has been judicially placed. We defer for the present, however, more than an allusion to this point.

The death, in child-bed, of Queen Jane in 1537, made the king once more a free man. With his subsequent marriage with Anne of Cleves, a brief and bloodless episode in his history, we have nothing to do. That marriage was contracted without any legislative aid, and the law was therefore suffered to continue in its revised state. But Henry, who was disappointed with his Flemish bride, was not long in determining a divorce; — a measure which the complete legality of the marriage made somewhat difficult. To add to the embarrassments of his position, Lady Catherine Howard, of whom he had become suddenly enamoured, and whom he had determined to promote to the Princess Anne's place, was cousin-german to Anne Boleyn, a degree of relationship which by the canon law would have formed an impediment to her marriage with the king. To remove these several difficulties, it was arranged that the convocation² should pronounce void the king's marriage with Anne of Cleves, and that the Parliament should by express enactment place the king in a position to wed the Lady Catherine. Perhaps,

¹ The day mentioned in the proviso is the 3d Nov., 25 H. 8. The Parliament which passed the 25 H. 8. c. 22. was prorogued to that day. — House of Lords' Journals, i. 82. Burnet's Reform. i. 152.

² The convocation solemnly determined that the king never having felt any liking for Anne of Cleves, must be taken never to have truly consented to an alliance with her.

indeed, it might have been reasonably doubted whether such an impediment as existed between Henry and Lady Catherine were not virtually removed by the 28 H. 8. c. 7., which by declaring expressly what the legal prohibitions should thenceforth be, might be supposed impliedly to incapacitate any Court from adding by its sentence to their number. On the other hand, it might be said in behalf of the spiritual courts that their restrictive jurisdiction in such a case had never been expressly interfered with by the legislature.¹ The question was at least a doubtful one; and Henry's conscience, which seemed to grow prolific in minute scruples the more barren he proved it to be in honourable motives, required that it should be determined in his favour.

The obsequious Parliament was not backward in the part assigned them in this drama, and the sentence of divorce was instantly ratified by statute. Indulging a caprice which was eccentric even for despotism, Henry had determined that the modifications of the law, which his projected union with Lady Catherine required, should be made a universal obligation. It was accordingly enacted, in effect, by the 32nd H. VIII. c. 38. that all marriages not against God's laws should be lawful. That this provision was practically a sound one, was a happy accident for the nation. Considerations scarcely less personal dictated another clause of the act. He was now about fifty years of age; and in case the male infant recently borne him by Queen Jane should not survive, and his intended marriage with Catharine Howard should prove fruitless, he would be without a successor in the direct line. He seems at this time to have been kindly disposed towards the Princess Elizabeth, though the enactment declaring her illegitimacy, as well as that of the Princess Mary, were still unrepealed. As a first step, however, towards repealing it, he caused a clause to be inserted in the statute which we are about to lay before the reader, to make no marriage voidable by reason of any precontract; and as such an enactment would partially, if not wholly, remove the objections to the king's marriage with Anne Boleyn, it would to that extent place the Princess Elizabeth in a more favourable condition for succeeding.

¹ See 3 Burn's *Eccles. Law* (Phillimore), 392.

Such were the considerations¹ which led to the enactment of the 32 H. 8. c. 38., a statute materially affecting our present inquiry, and of which the title is as follows: "For Marriages to stand notwithstanding Pre-contracts." The preamble recites two mischiefs, viz. the avoiding of consummated marriages; 1st, by allegation of pre-contract; and, 2ndly, by other prohibitions than the law of God admits; and the second section enacts, in substance, "That all such marriages as shall be contracted between lawful persons (as by this act we declare all persons to be lawful that be not prohibited by God's law to marry"), they being solemnized in the face of the Church and consummate, &c. or fruit of children had, &c. shall be indissoluble, notwithstanding any pre-contract, not so consummate. And that no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the Levitical degrees. And that no person be admitted in any of the spiritual courts to any process, plea, or allegation contrary to this act. This statute, therefore, besides abolishing pre-contracts as grounds of divorce, made lawful all marriages without the Levitical degrees, *and* not against the law of God.

With an account of this enactment we close our sketch of those portions of Henry's matrimonial adventures which have had an influence on the laws we are at present considering. It will be seen by what curious accidents these laws were converted into the form which they exhibited at the close of his reign. Almost every fresh caprice of the uxorious and despotic monarch left a corresponding impress upon the statutes of the realm; and it seems little less than wonderful that such wayward and inconsistent changes on his part should in their cumulative effect upon the law have divested

¹ These causes will be found expressly enumerated by Collier. (Eccles. Hist. vol. ii. p. 179.) See also Hume's Hist. vol. iv. Append. note m. And Reeves' Hist. vol. iv. p. 221. There seems, however, this objection to the supposition that Henry's intention of legitimating Elizabeth, was the cause of the abolition of the impediment of pre-contracts; viz. — that the statute, so far as it concerns pre-contracts, has expressly and exclusively a *future* operation; — so that it leaves untouched the grounds of Anne Boleyn's divorce, which was a by-gone transaction. If one of the grounds of Anne of Cleves' divorce was a pre-contract with the Duke of Lorraine (Hume, chap. 8.), that circumstance would seem to involve in much obscurity the true causes of that enactment.

it of many of its worst features, and reduced it to a state of comparative consistency. Such, however, was the case. In the first place, the restrictions on marriage which had been imposed by the law of God were declared to be indispensable by the law of man; a position which had indeed been often strenuously asserted by many, but had never been expressly admitted by the Court of Rome. Next, the dispensing power of that court was abolished in all instances; a measure fraught with incalculable advantage to society at large. Finally, the 32 Hen. 8. c. 38. completed the reformation which the other statutes had commenced. By that act, all restrictions on marriage not imposed by the law of God were utterly abolished. Thus, the commencement of the reign found society encumbered with the papal restrictions, proper indeed with regard to such few as corresponded with the Divine injunctions, arbitrary and unmeaning with regard to the remainder; but to all of which indiscriminately, whether Divine or human, the same dispensing prerogative was asserted by the papacy: the conclusion of the same reign saw removed from the burdensome catalogue of restrictions to many, with their corresponding dispensations, as were the devices merely of human cupidity; while such as the Divine precepts and the dictates of morality pointed out as valid, were carefully preserved, and made, as was reasonable, from thenceforth absolutely inviolable. It has been said of the more important events of Henry's life that they enured in their issues, under an overruling Providence, to the benefit of the human race; surely, it may be remarked of the subordinate transactions of his reign, that neither the lusts of a tyrant nor the slavishness of a parliament had the effect of converting them into any thing else than a blessing.

It still remains for us to direct the reader's attention to the rest of the history of these statutes, which were either repealed or re-enacted according as the vicissitudes of religion and politics prompted Henry's successors to reject or to adopt the improvements which had been effected in his reign. In Edward VI.'s time, indeed, they received no alteration at all, except that by the 2 & 3 Edw. 6. c. 23. so much of the 32 Hen. 8. c. 38. as made marriages indissoluble, notwithstanding pre-contracts, was for the reasons recited in the

preamble to the act¹, repealed. The rest of the 32 Hen. 8. abolishing prohibition other than by God's law, remain as before. No sooner, however, had the premature demise of Edward placed Mary on the throne, than that princess set herself to work in earnest at the business of abolition and restoration. The first statute of her reign was naturally passed for the confirmation of her title to the throne; which, although it had been made sufficiently strong in law by an act passed toward the close of Henry's reign (35 Hen. 8. c. 1.), by which the Princesses Mary and Elizabeth were declared capable of inheriting, was yet open to the imputation, hitherto unremoved, that the marriage of her parents had been solemnly declared null and void from the beginning. That marriage was accordingly by statute 1 Mary sess. 2. c. 1.² declared to have been valid and within God's law; the divorce and separation were imputed to fraud, corruption, and malice, and the sentence of divorce was pronounced utterly null and void. The whole of the 25 Hen. 8. c. 22. (which confirmed Cranmer's sentence of divorce between Henry and Catherine, and settled the succession on the king's issue, by Anne Baleyn), and so much of 28 Hen. 8. c. 7. as declared the illegality of that marriage, were further repealed. We shall have occasion presently to comment upon the use made in argument of this statute by those who assert the validity of a marriage with a deceased wife's sister.

The 1 & 2 Ph. & Mary, c. 8., passed shortly afterwards, by one fell swoop abolished all the reformations, whether civil or religious, which had been effected in Henry's reign. Its precise effect on our subject was as follows. So much of the 28 H. 8. c. 7. as "*concerned a prohibition to marry within the degrees expressed in that act*" was repealed. The 28 H. 8. c. 16., which had abolished dispensations ob-

¹ It seems, however, that pre-contract is now no longer a cause for dissolving a marriage in England; for it appears *impliedly* taken away by stat. 26 Geo. 2. c. 33., which enacts, that there shall be no suit in the Ecclesiastical Court for compelling the celebration of marriage by reason of any contract, whether *per verba de presenti* or *per verba de futuro*, entered into after the 25th March, 1754. See Co. Litt. (Butl. & Harg.) 796. n.

² The title only of this act is printed among the Statutes at Large. It will be found, however, in vol. iv. of the edition of the Statutes printed by the Record Commission, 1819.

tained from Rome, was repealed in toto. The 32 H. 8. c. 38. "for marriages to stand notwithstanding pre-contracts," which, as regarded pre-contracts, had been repealed by the 2 & 3 Edw. 6. c. 23., was also repealed in toto. The effect of this sweeping enactment was, therefore, to repeal the whole body of statutes which we have been at the pains of laying before the reader, with the single exception of the unrepealed portion (whatever that was) of the 28 H. 8. c. 7.

The last statute to which we have to direct attention is the 1 Eliz. c. 1., which repealed the 1 & 2 P. & M. c. 8., and expressly revived the 28 H. 8. c. 16., and so much of the 32 H. 8. c. 38. as had not been repealed by the 2 & 3 Edw. 6. c. 23., adding the provision, "that all other laws and statutes repealed by the 1 & 2 Ph. & M. c. 8. shall continue repealed." The repealed portion of the 28 H. 8. c. 7. was therefore not revived.

We presume, that whatever appetite the reader may possess for remote statutory inquiry, the repast here provided him will be considered sufficient. By setting out at large, with as little comment as possible, all the statutes relating to our subject, with the immediate reasons which led to their enactment, we conceive that the surest course has been adopted for arriving at a sound conclusion upon them. It remains for us to resolve upon the entire statement, what are the statutes which are at present in force and operation,—a task which will at once evolve the issues to be determined between ourselves and our opponents.

With the 25 H. 8. c. 22., repealed first by the 28 H. 8. c. 7., and afterwards by the 1 Mary, sess. 2. c. 1., and never since revived, we have nothing to do. The first statute, therefore, to be considered, is the 28 H. 8. c. 7., which, in its original state, declared in terms all the marriages prohibited by God's law, except some in the direct ascending and descending line, but including the case of a wife's sister, and abolished all dispensations in such cases. That portion of this act which madevoid the marriage of Henry with Catherine of Arragon was, as we have seen, repealed by the act of 1 Mary, sess. 2.; but the point we have now to consider is the effect of the act of 1 & 2 Ph. & M., which repealed so

much of it as "concerned a prohibition to marry within the degrees" therein expressed. The first question arises on the meaning of these words: on the one side it is said, that their effect is to repeal all the provisions of the act which relate to the prohibited degrees, including the declaration itself of what those degrees are; on the other side, that their effect is simply to repeal that part of the act which makes indispensable all marriages within the degrees there declared to be within God's law, leaving the declaratory part itself wholly untouched: we are decidedly of the latter opinion. The act of 1 & 2 P. & M. merely alludes to "so much of the 28 H. 8. as concerneth a prohibition to marry within the degrees expressed in the said act." Inasmuch, then, as the parts of the 28 H. 8. c. 7. are easily divisible¹, so as to admit of our rejecting the sentences which make prohibitions within God's law indispensable, without disturbing the sentences declaratory of what God's law is, we apprehend the former sentences only are repealed by the 1 & 2 P. & M., and that the latter remain valid and binding. It is reasonable enough to suppose that the 1 & 2 P. & M. would repeal any legislative interference with the prerogatives of Rome, especially when such interferences so materially affected the Queen's legitimacy; but there is nothing to justify the presumption that it was within the purview of that act to touch the prohibitions against marriage within near degrees, of which prohibitions the Papacy was itself so warm a supporter.² It is consistent with this view that the 1 Eliz. c. 1. did not revive the restraints against dispensations in these particular cases, as the 28 H. 8. c. 16., which it *did* revive, contained a sweeping abolition of the dispensing powers of the Holy See in all instances. Had the *declaratory* portion of the 28 H. . c. 7. been repealed, it is not probable that the act of 1 Eliz., which was intended to re-establish all the improvements effected in Henry's reign, would not have revived it.

There is another ground on which Chief Justice Vaughan,

¹ In the 25 H. 8. c. 22. (which was repealed by the 28 H. 8. c. 7.) the declaratory enactment was contained in one clause, and the enactment disallowing dispensations in another. In the 28 H. 8. c. 7. they are both incorporated in the same clause.

² *Hill v. Good*, Vaughan, 327.

in his judgment in the great case of *Hill v. Good*, considered the 28 H. 8. c. 7. to be still in force. He held that the reference to that statute contained in the 2nd sect. of the 28 H. 8. c. 16. was sufficient to work a re-enactment of c. 7., when c. 16. was reviewed by the 1st Eliz. We have in a former paragraph given the grounds for our opinion, that nothing more was meant by the reference to c. 7. in c. 16. than to except from the operation of the latter statute all marriages which, having been contracted before a specified day, were not within the prohibitions contained in the former. Consequently, no independent prospective operation was gained by that reference, sufficient to make the repeal of c. 7. an immaterial question. "And here," says Collier¹, in noticing the 28 H. 8. c. 16., "by way of remedy, and to prevent inconvenience, all marriages solemnized before the 23d" (quære 3d) "of November in the 26th" (quære 25th) "year of this reign, not prohibited by the law of God, and where no divorce had passed upon 'em in the spiritual courts, are declared good in law." We forbear, therefore, while insisting on the present operation of 28 H. 8. c. 7., to avail ourselves of an argument which in our judgment does not properly apply.

We now come to the 32 H. 8. c. 38., a statute which is admitted without dispute to be still in force. That act first declares "all marriages to be lawful that be not prohibited by God's law;" and further enacts (§ 2.), "that no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the Levitical degrees." It was on this statute that the case of *Hill v. Good* was expressly decided; and Chief Justice Vaughan there established a distinction between the expressions "Levitical prohibitions" and "Levitical degrees," and held the former to imply merely the letter of the Levitical law (Lev. xviii.), while the latter embraced all marriages which were within the same *degrees* as those prohibited in Leviticus — the Levitical prohibitions being viewed merely as *instances* of a more enlarged and consistent rule. Thus there are several degrees, such as the paternal or maternal grandmother, the brother's daughter,

¹ Ecoles. Hist. vol. ii. p. 119. See also Burnet's Hist. Reform., vol. i. p. 212., and Reeves' History, vol. iv. p. 217.

the sister's daughter, and others, which the Levitical prohibitions do not include, but which are clearly within the Levitical degrees. Among others, the marriage of a man with his brother's wife is expressly prohibited (Lev. xviii. 16. — xx. 21.). It would seem to follow, although the prohibition is not to be found in the Mosaic books, that the marriage of a man with his deceased wife's sister, the degrees being in such case the same, comes within the same rule. Against this presumption, however, two texts have been quoted. The first (in Deut. xxv. 5.) is said to clash with the prohibition of marriage between a man and his brother's widow, and therefore to defeat any inference which a parity of reasoning might draw from it. That text enjoins that, "If brethren dwell together, and one of them die, and have no child, the wife of the dead shall not marry without unto a stranger; her husband's brother shall go in unto her, and take her to him to wife." The sixth verse seems to explain the reason: "And it shall be, that the firstborn that she beareth shall succeed in the name of the brother which is dead, that his name be not put out of Israel." This injunction, which seems at first inconsistent with the law of Lev. xviii. 16., and with the punishment of childlessness thereto annexed, has been usually explained as an exception grafted on the latter, and as having reference to the particular rules of inheritance given to the Jews, by which the land was always to be kept in the Hebrew families, and not to pass into the hands of strangers. The other text to which we allude, as being at first inconsistent with the construction we contended for, is the last of the Levitical prohibitions (Lev. xviii. 18.): "Neither shalt thou take a wife to her sister, to vex her, to uncover her nakedness, besides the other *in her lifetime*." If unlawful only *during the wife's lifetime*, then by implication it is permitted after her death. Such is the plausible inference. The text undoubtedly presents difficulties; nor is there any construction which entirely avoids them. Polygamy was, however, practised in Judah, and even recognised by the law (Deut. xxi. 15.); and the most probable interpretation seems to be, that in the instance of two sisters it should in nowise be permitted. The unlawfulness of a union with sisters *in succession* was left to be collected from the foregoing verses.

Perhaps, however, it is unnecessary to enter at large into the Scriptural department of the argument, inasmuch as the case of *Hill v. Good* is an express decision upon the 32 H. 8. c. 38. : first, that that statute refers to the law of God as contained in Leviticus, and, secondly, that the case of a wife's sister is within that law. Nor are we enabled to see how reliance can be placed on the terms of the act of 32 H. 8. in the same breath that a judicial interpretation of those terms, never since overruled, is wholly disregarded.

The case of *Hill v. Good* is, however, said to have been decided "in mistake," as no notice was there taken of the stat. 1 Mary sess. 2. c. 1., which expressly declared the legality of the marriage of Henry and Catherine of Arragon; a declaration which, if it is to have the force of a principle, may certainly be construed to include the case before us. It is manifest, however, that that act, being *in pari materia* with the other statutes we have been considering, must be construed with reference to them. Now, the marriage of Henry and Catherine, being within the canonical degrees, could on no supposition have been lawful without a papal dispensation. Such a dispensation, however valid at the time, came clearly within that clause of the 28 H. 8. c. 16. which made wholly invalid to all intents all bulls, breves, faculties, and dispensations. Nor was the retrospective operation of this last act avoided by the proviso of exceptions to which allusion has been so often made; inasmuch as that proviso extended only to certain prior marriages "not prohibited by God's law, limited, and declared" in 28 H. 8. c. 7.; a statute the declaratory part of which is said, indeed, on one side to be repealed, but which may at all events be read in aid of the interpretation of 28 H. 8. c. 16., and which *expressly* prohibited, as within God's law, a marriage with a brother's widow. Whatever, therefore, might have been the force of the act of 1 Mary sess. 2., *at the time it was passed*, the re-enactment of 28 H. 8. c. 16. by the act of Elizabeth was a constructive repeal of so much of that act as declared the legality of the king's marriage. Possibly, indeed, it might be said that the act of Mary was in truth in the nature of a private statute, governing her case alone; a proposition to which our argument enables us to assent, and which the honour of the British

Crown may be supposed to require. At all events, the succession was by that act as effectually confirmed to Mary as if her birth in lawful wedlock had given a title independent of parliamentary support. When urged to take the oath of succession, Sir Thomas More refused on the ground that it implied by its terms the illegality of Henry's marriage with Catherine; adding, that with regard to acknowledging the succession he felt no scruples whatever, as that was a matter which parliament was competent to appoint. We agree with the ex-chancellor in the soundness of his distinction, though we employ it to arrive at a contrary conclusion. Legislative enactments, no less than the Divine precept, throw a cloud around Henry's first marriage, which Mary's title to the throne does not require us to dissipate.

To sum up our arguments. The statute 5 & 6 Will. 4. c. 5. avoids all marriages within the prohibited degrees of consanguinity or affinity. The term "prohibited" refers either to the prohibitions of the Canon Law or of the Statute Law. If of the Canon Law, that is confessed to prohibit the case of a wife's sister. If of the Statute Law, there, on the supposition that the 28 Hen. 8. c. 7. remains unrepealed in its declaratory parts, that statute also prohibits the case of a wife's sister; if that statute is repealed as to its declaratory parts, then, at all events, the 32 Hen. 8. c. 38., admitted to be now in operation, prohibits marriages within the Levitical degrees, and according to the construction which those degrees have received by an English Court of Law, they also include the case of a wife's sister. Such a marriage is therefore prohibited by the statute law. Consequently, *quâcunque viâ*, it is made absolutely void by the statute of Will. IV. It is not often that with an argument so manifold in its branches, we are enabled to arrive at so uniform a conclusion.

ART. VIII. — CHANCERY REFORM. — THE MASTERS' OFFICE.

Facts and Suggestions respecting the Masters' Office. [By N. W. SENIOR, ESQ.] *Stevens and Norton, 1841.*

IF we have not yet turned our special attention to the subject of Chancery Reform, it is assuredly from no doubt as to its necessity and importance. We have, perhaps, been rather dismayed at the vastness of the subject, and the labour which its consideration imposed. We trust, however, that having once entered upon it, we shall be enabled to pursue it steadfastly; and if on this, or the next, or many other occasions, we may render but little service, yet eventually we may be able to obtain the attention which the subject so well deserves.

We propose in this article only to open the subject, to break the ground, to see what has been proposed, to show where the chief difficulties lie, to suggest points for the exertions of ourselves and others. On this, as on all other matters, we would proceed carefully, we would examine closely and patiently; but once being sure that we are right in our conclusions, we are of opinion that a great change is as easy and practicable, and quite as safe as a small one. Let us then trace the recent progress of Chancery Reform. For the present we do not advert to the great Eldonian conflicts which resulted in the valuable though very undeservedly neglected Report of 1826, which is in fact a vast arsenal of suggestions, whence many have taken weapons of attack, burnished them bright, and passed them off as new.

In the years 1839, 1840, and 1841, the reform of the Court of Chancery assumed a very practical shape. It attracted the notice of the profession; the solicitors in particular set their shoulders to the wheel, and a strong and partially successful agitation was commenced. After being twice deferred by the Whig Government, once willingly, the second

time unwillingly, the act for appointing two new Vice Chancellors was the first measure of importance to which Sir Robert Peel addressed himself, and its successful issue gilded the dawn of his administration. This was followed by the act abolishing the Six Clerks and Sworn Clerks, and transferring the taxation of costs from the Masters in Chancery to the Taxing Masters; a proper and useful measure, but sadly tarnished by the disgraceful compensations which it saddled on the suitors. These are all the direct fruits which have as yet been reaped.

But there was an act which was passed even before the Chancery Judges' Act, to which all real reformers looked as more likely to effect a remedy of Chancery abuses, than even two new Vice Chancellors and six new Taxing Masters. This was the act 3 & 4 Vict. c. 94., amended by 4 & 5 Vict. c. 52., by which the most extensive powers were given to the judges of the court over the practice, pleadings, procedure, and officers of the Court of Chancery, not perpetually (for that might have been delusive), but for *five years* from the passing of the act (10th August, 1840). But, alas! except a batch of orders in 1841, and another in 1845, containing, it is true, many useful provisions and regulations beneficial to the suitor, but both of them proceeding on the questionable principle of leaving all preceding orders unrevoked, and thus forcing practitioners and the court to graft them in themselves upon the old orders; entering like a band of invaders upon the land, in continual and most costly conflict with all that had gone before them; nothing at all has been done, not only in the five years, for they have expired, but in nearly seven years, the act having been renewed in 1845¹ for another period of five years, which, so far, has been as fruitless as the original term for which the act was passed.

But this is not all. A commission was appointed to carry the act into effect, or, at all events, to consider what steps it would be advisable to take under it, and to make it especially tantalising, the commissioners understood to be named were such as the true Chancery reformer fully approved. It was understood that this duty was entrusted to

¹ 8 & 9 Vict. c. 105.

Lord Langdale, M. R., Vice Chancellor Wigram, Mr. Pemberton Leigh (then at the bar), and the late Mr. Sutton Sharpe. We say it was *understood*, because this commission (the more's the pity) was not a *bonâ fide* flesh and blood commission, having a local habitation and receiving a substantial consideration for its labours. They rather belong to that class of good spirits who poets tell us all unseen are ministering to the wants and wishes of mankind.

But, alas! we must say again, although much time we know was spent on the subject by the commission, although many communications were made to them, although much, we presume, was proposed, little has been *done*, and we are now, in 1847, as to the great bulk of Chancery grievances, which were to be remedied by the act, just where we were in 1840. Whether this commission still exists, whether its members still have any meetings, we do not at all know. Death deprived it of one of its most able and efficient members, Mr. Sutton Sharpe, and whether a bill of revivor then became necessary, or the commission abated or dispersed into air, we have no means of ascertaining.

But who is to blame for this state of things? Who is to give us back, out of our short space of life, the seven years of improved justice which we might have had? Should not the very circumstance, which appears so unfortunately to have terminated the commission, the death of one of its members, have reminded the survivors of the shortness of life, the uncertainty of realising the fairest expectations? Did not Mr. Pemberton Leigh remember those "words that burn" which he uttered in the House of Commons in 1840, and to some of which we shall venture to recall his attention in the course of this article? Where was Lord Lyndhurst in this long interval, during nearly the whole of which he held the Great Seal? Was he urging on the commissioners? Was he pressing them for recommendations? Did he suffer the commission to expire, or is it still in existence? And what has been done since he resigned the Great Seal? Has the present Lord Chancellor revived it, if revival were necessary? We know that his lordship is cognizant of the provisions of the act. With no disposition to impose unnecessary blame, it appears to us that gross neglect does exist somewhere, and thus it is that we are now brought to the point in the

long catalogue of Chancery grievances which appears to us most deserving the attention of those whom the legislature has entrusted with the grave duty of carrying the act of 1840 into effect.¹

Does any one doubt that the worst grievances exist? Unfortunately, differing much as to remedy, all admit the existence of the disease. To professional persons, no evidence of this is necessary; but as this work sometimes goes into other hands, we shall show, that at a very recent period, opinions as to the present state of the Court of Chancery have been delivered in the most solemn manner by persons the best qualified to pronounce their judgment. In the debate on the Charitable Trusts Bill, on the 18th of May, 1846, Lord Campbell

“Allowed that some measure of this sort was necessary. Things ought not to remain as they were. It was a reproach to the law of this country; but it was not in the appointment of a commission of this sort that a remedy was to be found. It was *in the reform of one of the regular tribunals of the country*. No doubt it was an admirable tribunal; there was a careful investigation, a patient hearing, and justice was administered. The only objection was the expense of litigation: the obvious remedy then was to diminish the expense. But charities were only specimens of what might be said of the Court of Chancery, with regard to any small sums of money recoverable in equity. If the person had a legacy of 50*l.*, to recover it by suit in equity would lead to a certain loss of a larger sum. The proper remedy then would be to allow justice to be cheaply administered.”

But the speech of Lord Lyndhurst, then Chancellor, is even stronger.

“Every body knows that the only tribunal which has the power to inquire into the administration of charities, is the Court of Chancery, and that there is no other tribunal established for the purpose of controlling abuses or assisting persons who complain of maladministration. I am ready to admit that no tribunal is, in most respects, better calculated to administer trusts, and to do justice in matters of this description than the Court of Chancery. This court has been presided over by men of great learning, great

¹ Since this was written Lord John Russell has stated in the House of Commons that the commissioners made no report, but only suggestions, (April 15. 1847). It is quite possible, therefore, that no blame attaches to them.

wisdom, and great prudence, and an admirable system has grown up adapted to it. But for one circumstance, therefore, I should never have thought of bringing in this bill. If every charity could practically be brought under the consideration of the Court of Chancery, I should feel an entire and implicit acquiescence that justice would be done. But unfortunately there are few charities that can come under the consideration of that court. As far as the great charities are concerned, this is a tribunal without exception, in some respects, *but even in regard to them it is impossible not to feel that ENORMOUS expenses are incurred, and that great deductions are made from those funds which ought to be solely employed in the purposes of the charity. In the case of charities of moderate amount, RUINOUS expenses are incurred in an application to the court. But with respect to the smaller charities, the DOORS OF THE COURT ARE ABSOLUTELY CLOSED AGAINST THEM.* No man of sane intellect, or of tolerable experience, would recommend an application to the Court of Chancery in the case of these smaller charities. *The consequence is an absolute denial of justice.* Whatever abuses take place in their management, parties are bound to abstain from all application to the court, for the expenses of one day's entrance into that court would annihilate the charities to which I refer."

Thus we here have it admitted by the highest authority on the subject, that in the case of large charities, the expenses are enormous; in the case of charities of moderate amount the expenses are ruinous, but that in the smaller charities, they occasion a total denial of justice.

But is this grievance confined to charities? The same causes which here obstruct justice, equally defeat it in all other matters of similar amount. This was fully admitted on the same occasion by the present Lord Chancellor, and we have some reason for supposing that his Lordship's attention has been directed to this speech since his recent accession to office.

And what say the solicitors of the Court to all this; those solicitors who are sometimes represented as so hostile to reform, but whom we have ever found friendly to all useful measures tending to the real benefit of the suitor? We believe their sentiments precisely correspond at the present time with those which they so ably expressed in August, 1840.

In a petition, then presented to the House of Commons,

and printed, signed by most of the eminent solicitors of the Metropolis, there were the following statements :—

“ That the delay and expense at present attendant on proceedings in the Chancery Court are so great as effectually to close its doors against all except the richer classes of claimants.

“ That the expense (which arises principally from the delay) is so serious, as to render it imperative on the profession to prevent, as far as possible, the institution of suits for amounts much under 1000*l*.

“ That, therefore, while at common law rights of small amount can without impropriety be submitted to legal decision, a very large and important section of the community (*viz.* persons interested in trust property of amounts under 1000*l.*) are left without the protection of the law, and for them there is absolutely no equity court in operation. That your petitioners humbly hope that, in the representations which they have made of the importance of rendering the proceedings in equity more expeditious and cheap, it will be felt by your Honourable House that they are advocating improvements of the greatest importance to the interests of the suitor, and of the community, whilst, at the same time, your petitioners freely admit that they believe that these improvements will also, in the end, be advantageous to their own body, from the conviction, that the interest of the solicitor is, in all these questions, identified with that of his client.”

The especial grievance was then, perhaps, the want of judicial power, which has now been supplied. What is felt to be the great grievance at the present time? We think it is universally admitted to be the Masters' Office. The words of Mr. Pemberton Leigh, in 1840, have lost nothing of their force as applied to 1847.

“ It is impossible to deny that it is against their office more than any others that the opinion of the profession is directed *
* * * * .

The system appears to be contrived to damp all energy. Which of the ordinary motives to exertion is left to operate on the minds of the Masters? Secluded in the recesses of their dark chambers, exempt from the control or inspection of the judges—relieved from the competition of the bar—*independent of the opinion of the solicitors, and their proceedings totally unknown to the public*—acquiring no credit by diligence or ability—incurring neither loss nor censure by indolence, or inattention—with nothing to hope and nothing to

fear — can any man be placed in circumstances so unfavourable to exertion?"

"It does appear to me that nothing can ever be done effectually to expedite the business of the Court of Chancery till a complete alteration is made in the whole system of the Masters' Office. I make no complaint of them personally, but of the system for which they are not responsible; and I trust they will feel that it is only by a full exposure of the evils of that system that we can hope to see such improvement made in it as will make the offices themselves infinitely more useful to the public, and therefore, at the same time, more honourable, and, I doubt not, more agreeable to the holders. Sure I am that until this is done, the Masters will never occupy in public opinion the station which they would then fairly claim."

All this being then admitted, we proceed to mention the remedies which have been suggested. In doing this we do not profess to state all that have been proposed. We only allude to those which it appears to us may, at the present time, be usefully considered.

All plans of reform seem to range themselves under one of the following heads:—I. Plans which go to the improvement of the Masters' Office. II. Plans which transfer the duties of the Master, either wholly, or partially to some other judicial person.

I.—1. Under the first head it is proposed to abolish the mode of proceeding by hourly warrants and to proceed continuously in every matter until it is disposed of. This would no doubt be a useful alteration, and was recommended by the Chancery Commissioners in 1826, and again, in the present year, by the Equity Committee of the Law Amendment Society. It is to be observed, however, that it has already been tried to some extent, as some Masters will always grant continuous warrants extending over the whole day, if necessary. It cannot indeed be doubted, that the system of hourly warrants should be altogether abolished. But then, the reform must not be allowed to stop there.

2. The attendance at the public office has long been considered as a useless ceremony, and should by common consent be done away.

"I concur," says Mr. Senior, "in the general opinion that the

presence of the Masters for the purpose of signing fiats and jurats should be dispensed with * *. The principal business of the public office, that is, the preparing the jurat and administering the oath or affirmation, is performed and exceedingly well performed by the clerk. The Master has merely the mechanical duty of signing his name." P. 39.

3. It has been thought, that much benefit would arise from making further alterations of the rules, as to parties. This is thus alluded to by Mr. Pemberton Leigh, and great good has already been done in the particulars mentioned by one of the order of 1841.

"There are cases," says Mr. Pemberton Leigh, "in which, singular as it may appear, by straining to an excess a principle which is at the root of all justice, the most serious injustice is actually done. If there be one principle in the administration of law which would seem to require no qualification, it is the rule that no man's interest shall be affected without his being heard. And yet, as this rule is acted upon, it is the most fruitful, perhaps, of all sources of expense and delay — of needless expense and delay. If a landed estate is to be dealt with in the Court of Chancery, all persons who have an interest in it must be brought into court before it can be touched. Now these persons are often extremely numerous. Take the most familiar case. A gentleman of landed property devises it by his will to trustees — he charges it with the payment of portions to his younger children and legacies and annuities to his friends and servants; and subject to these incumbrances, he gives it in trust for his eldest and other sons in succession, and their issue. There is no question about the sufficiency of the estate to satisfy all the charges a hundred times told, yet if the trusts of this will are to be executed by the Court of Chancery, all these persons, trustees, and *cestui que trusts*, children, friends, and servants, must all be parties to the suit. But it not improbably happens that the children's portions are also in settlement; and if so, the trustees of their settlements, and the parties interested under them, husbands, wives, and children, must equally be parties. Nor is this all. If during the pendency of the suit any of these innumerable parties die, or children taking an interest are born, additional bills of revivor and supplement are necessary, till at last the record is so incumbered, that any effectual progress in the suit becomes almost impracticable. Each party may employ a separate solicitor and

counsel, and costs are accumulated to an extent which no moderate estate can bear. Now what is the cause assigned for this most ruinous practice? Why, a principle in theory unimpeachable, that the interest of all these parties may be affected by the decision, and therefore they ought all to be heard. It is said that the Court cannot tell that the estate is more than sufficient to pay the charges; and that therefore a legatee of 20*l.* must be present at taking all the accounts in the Master's office, by which the fund subject to his demand, and the amount of the charges upon that fund are to be ascertained; and that if a question arises on the construction of the will, he has the same right to be heard in defence of the fund on which his 20*l.* is charged as the owner of the estate itself, subject to the charge, though the estate may be worth 20,000*l.* a year; yet it is very obvious that the legatee of 20*l.* might safely trust the defence of the estate to his owner, who cannot protect the 20,000*l.* a year without protecting at the same time the 20*l.*; and that the only real consequence of the rule to the favoured legatee is, that his whole 20*l.*, and much more, is absorbed in the extra costs of the suit, which he has to pay. But what makes this rule the more unreasonable is, that if the estate be held by a legal and not an equitable title (a distinction hardly intelligible to any persons but lawyers), and the question is tried at law, none of these parties can interfere; the title is defended by the party in possession, or asserted by the party claiming the possession; and they, and they alone, can be heard. Nay, in the Court of Chancery, if instead of real estate the property happens to be personalty, a totally different rule prevails. If a personal estate of a man who dies worth a million is administered, the executors are considered sufficiently to represent the interests of all parties, creditors, legatees, and annuitants; and yet precisely the same argument might be used with respect to the doubt as to the sufficiency of the fund, and the interest of every legatee to see that the accounts of the estate are properly taken in the Master's office, which, with respect to land, is thought to require the presence of all these different parties. Nay, if the land, instead of being held in fee simple, is held for 1000 years, then it is personal estate, and is sufficiently represented by the executor. Now under wills the same person is most commonly both trustee and executor. Whatever be the amount of the property — however enormous — if it be leasehold, one defendant is sufficient; if there be an acre of freehold, a hundred other parties become necessary.

“Surely there is no sense nor convenience in acting upon rules so opposite, in cases substantially the same; and I can see no

sufficient reason why the trustee in such cases should not be deemed to represent the real estate, as completely as the executor represents the personality. In cases where there is no trustee, some other arrangement would be necessary; but in all cases of this description, I have little doubt that a most important reduction may be made in the number of parties, and that the expense and delay of such suits may be diminished to a very small part of its present amount."

We have placed this as one of the suggestions towards the improvement of the Masters' Office, because it appears to us, that the Master might be authorised to report, specially, to the Court on this subject in any cause referred to him, and thus to cut off parties and limit inquiries.

4. It has been contended that in some suits the pleadings and first hearing are unnecessary; that the object of the suit is to get into the Masters' Office for the purpose of taking accounts, &c., and it has therefore been proposed that the parties might be allowed to go there in the first instance. This is recommended in a report of the equity committee of the Law Amendment Society, as applicable more especially to administration suits:—

"The committee have come to the conclusion, that the amendment of the law in this branch of its administration will be best promoted by providing—that every executor or administrator should have power to make a summary application to a Master of the Court of Chancery for liberty to administer the assets before him;—that any creditor, legatee, or next of kin, having claims against an estate, should have the like liberty of applying to a Master in a summary way for a judicial administration of the estate;—that the Master should, on such application, have power at once to take the same accounts and inquiries, as are now in like cases directed by decree after a formal hearing upon recorded pleadings;—that the Master should call in all creditors to make their claims before him, and should examine the executor as to the amount of the property in his hands;—that he should find what was due for debts and legacies, ascertain the residue, and, when necessary, who were the next of kin;—that if the executor admits a balance in his hands, the solicitor of any party interested should be authorised to apply, giving notice to his opponent, and the Master to order, that such balance be paid into court;—that the Master should also be empowered to make orders for the

production of papers belonging to the trust, when admitted by the executor to be hands, so as to relieve parties from the expense of those applications which are now made to the Court upon admissions in answers.

"The committee, as will be seen by the above suggestions, do not think it expedient that the powers of the Masters should be confined to the mere duty of reporting to the Court. If a living debtor become bankrupt, the whole of his property is got in and administered under the direction of a commissioner, without the intervention of any other judge, excepting by way of appeal; and the commissioner is called upon immediately to determine every question of law or equity, however important, that may arise. The committee can discover no substantial reason why the property of a deceased debtor should not be judicially administered by a Master in Chancery in the same manner. The committee can have no doubt that Masters in Chancery would be fully competent to the discharge of these duties, though the present mode of proceeding before them must necessarily undergo very considerable alterations in order to bring the proposed additional jurisdiction into favourable operation."

II. But we now come to those bolder plans which transfer the duties at present performed by Masters to some other judicial person. It is said by the supporters of these plans that all effectual reform of the Masters' Office is hopeless; that the system there pursued is radically wrong; that the associations connected with the office can never be removed; that no modification of the present practice will be of any lasting or essential benefit; but that a complete and thorough change, extending to the gradual abolition of the office in its present form, is absolutely necessary. That, in fact, the Masters' office is the great practical blot on the administration of equity, and that some other system of administering the important duties now entrusted to it must be found or invented; and that here, indeed, any change must be for the better. Without allowing this to the fullest extent, and admitting, indeed, that there is a great deal of good done every day in this office — nay, that in some matters its procedure is excellent¹, we cannot deny that, looking to the practical results obtained from it as a whole, it is fairly

¹ As to this, we beg to refer to Mr. Senior's useful and very clear and able pamphlet.

entitled to condemnation. It is difficult to see how it has got into its present state, and still more hard to find out how it can be really or usefully amended. It would seem to require such a reconstruction, such an alteration of its present duties, such a division of its present labours, as would amount to its virtual abolition; and we do not hesitate to say, however bold it may appear, that its entire abolition would be a safer measure, and one more likely to gain the confidence of the public, than any half-measure, which would "scotch the snake, not kill it."

Nobody disputes that many suits in Chancery must take time; that in these the Court is employed as a depository, a receiver, a manager, a trustee. In the vast majority of Chancery suits there is nothing to be litigated, and all parties are agreed before they go into court. Its administrative functions are alone to be exercised, although even here an occasion may at any time arise for the exercise of its judicial powers. These suits, however, it is impossible to expedite; the events on which they are to terminate depend on time, not on human exertion. But there are also a great many suits which depend on a single point; and on this being decided, the suit is practically at an end. In these the present procedure is fraught with the most frightful injustice; nor is the expression of Sir Samuel Romilly at all too strong, as applied to them, when he said, that "if the number of suitors was in a due proportion to the rest of the population, the Court of Chancery would be abolished as a nuisance."

It is to be observed, that several recent acts have proceeded on the principle of transferring certain branches of equity jurisdiction, chiefly administered in the Masters' Office, to other tribunals. This was done (as we have already mentioned), as to costs, by stat. 5 & 6 Vict. c. 103., but here the real transfer was from the Sworn Clerks rather than from the Masters. The removal of the lunacy business to the Masters in Lunacy, by the stat. 5 & 6 Vict. c. 84., was, however, complete, and we believe that the results are satisfactory, so far as expense and delay are concerned. Then in drainage matters there was an attempt made by stat. 3 & 4 Vict. c. 55. to allow persons having a limited interest in lands to obtain money, for the purpose of draining, by means

of the Masters' Office. This machinery was, however, so uninviting, that the land remained undrained.¹ But when Drainage Commissioners (however inferior in themselves to Masters) were appointed by an act of last session (9 & 10 Vict. c. 101.) applications poured in from every side. The last act, which accomplishes a further transfer, is the County Courts Act, 9 & 10 Vict. c. 95. s. 65., under which these courts have jurisdiction in certain demands under 20*l.*, as to which courts of equity only had jurisdiction.

It cannot be doubted that a very strong dislike of the Masters' office rests in the public mind. It is, unfortunately, the machine for transacting a great portion of the business connected with property in this country; but it is viewed with fear by almost all who have any thing to do with it. A dread, the causes of which are not accurately defined, appals the mind on the bare reference to it. Months here count as days, and years as months. This feeling is shown whenever an opportunity occurs. The recent acts to which we have just alluded, are pretty good evidence of it; it was shown further in the debates in both Houses of Parliament on charitable trusts last session, when there seemed a very general desire to remove all small trusts of this description from the Masters' Office, and it was lastly shown in the present session of Parliament in the Committee on one of the Irish bills. On reference being made to the Masters' Office in Ireland, Mr. Shaw the Dublin Recorder, implored the Government not to send the parties into the Masters' Office, as it was associated in the minds of the people with ruin and misery; and we shall be surprised if the session is allowed to pass without some further exhibition of this feeling as connected with other measures of Government.

All these circumstances prove that there is a strong and very general dislike of the Masters' Office. Indeed, no better proof of this can be given than one of Mr. Pemberton Leigh's:—

¹ In their report (1845) the Lords say, "The apprehension of great delay and expense consequent upon proceedings under that statute appear to have very generally deterred persons from seeking to take advantage of it. Not more than eleven applications appear to have been made under that statute, although the evidence fully satisfied the committee that cases are constantly occurring to which some measure of that nature might be more beneficially applied." (p. 2.)

“There is no considerable landed estate which is not subject to trusts which Courts of Equity only can control. There is no personal estate, in the disposition of which, on the death of the owner, difficulties arise, which can be administered except through this medium, and yet the number of bills is hardly increased since the time of Lord Hardwicke.”¹

Having pretty well established this, we would ask what is proposed in substitution?

1. One proposal which has been received with much favour, is to extend the jurisdiction of the Court of Bankruptcy to some equity matters, more especially those involving matters of account. This has been put in a striking point of view by Mr. Commissioner Fane:—

“In Chancery the suitor applies first to the Judge; every thing is done in writing; the Judge, after great expense has been incurred and after a long delay, makes a decree; that decree tells the Master, in endless detail, what he is to do (just as if he required to be taught the simplest matters); the decree is drawn up, not by the Judge, who might be thought wiser than the Master, but by a registrar, who, in teaching the Master, frequently omits some material direction; the parties then adjourn to the Master's office, there the matter lingers, month after month, and year after year; at last the Master makes his report, tells the Court what he has found, and sometimes what he would have found if the registrar had authorised him to do so; and at last the Court either acts, or sends the matter back to the Master with new directions. Meanwhile, as Lord Bacon said about two hundred years ago, ‘Though the Chancery pace be slow, the suitor's pulse beats quick.’ I know of nothing to which to compare this process, except the game of battledore and shuttlecock, in which the poor suitor plays the part of the shuttlecock, and is tossed from the Judge to the Master, and from the Master to the Judge, over and over, till the scene is closed only too often by despair, insolvency, or death.

“In Bankruptcy the suitor applies, it is true, to the Chancellor; but the Chancellor refers him, by the stroke of a pen, to the Commissioner, with no other instructions than such as would correspond with the usual mercantile instructions, ‘do the needful;’ instead of every thing being done in writing, scarcely any thing

¹ In the time of Lord Hardwicke (1750) the number of bills filed was 1744. In the year 1839, 2189.—See Mr. Pemberton Leigh's Speech. The number of bills has, we believe, increased since this speech.

is done in writing; and instead of the Master reporting every thing and doing nothing, the Commissioner does every thing and reports nothing. Does this system occasion dissatisfaction? I will leave your Lordship to judge from the facts of the last bankers' bankruptcy that came under my notice, the case of Messrs. Oliver and York, of Stoney Stratford, men respectable, though unfortunate. On the 18th of May, 1843, they were declared bankrupts; on the 3d of August (two months and sixteen days after) a dividend of 6s. 8d. in the pound was declared, amounting to 20,082*l.*; on the 16th of February following a further and final dividend of 5s. 9d. was declared, amounting to 19,156*l.*, and the estate was wound up. The bankrupts stated their good debts at 19,071*l.*, with some bad and doubtful debts; the debts collected were 19,545*l.* They stated their property to be worth 24,929*l.*; it realised 25,692*l.* The receipts and payments were as follow:—

Receipts.				Payments.			
	£	s.	d.		£	s.	d.
Property - - -	25,692	12	0	Dividends - - -	39,238	2	10
Less payments to mort-				Petty expenses of official			
gagees - - -	3,099	7	10	assignee - - -	15	15	0
Balance - - -	22,593	4	2	Rent and taxes - - -	406	8	3
Debts collected - -	19,545	18	0	Court fees - - -	159	0	10
Total Receipts -	42,139	2	2	Broker and messenger			
				of court - - -	52	8	10
				Solicitor's costs - -	988	6	3
				Remuneration of of-			
				ficial assignee - -	606	7	8
				Sundries - - -	355	4	9
				Balance in hand - -	317	7	9
				Total - - -	42,139	2	2

"The whole business began and ended between the 18th of May, 1843, and the 15th of March, 1844.

"It will be a happy day for the Chancery suitor when the Chancery method exhibits like results. The results of the Chancery method in the case of Messrs. Hammersleys and Co., the bankers, of Pall Mall, were, I fear, very different. Their bankruptcy occurred in 1840, and the business is not yet closed."—*Letter to Lord Cottenham*, 1846, pp. 14—16.

2. The only other proposal with which we are acquainted pointing to a direct transfer of the Master's duties is involved in the following resolutions, which were brought forward by

Mr. James Stewart, and fully discussed in March last at several meetings of the Law Amendment Society.

“That much of the delay and expense which now arises in the progress of a suit in Chancery is to be traced to the present practice of bringing the suit in the first instance before a Judge, who refers either the whole or a part of the matters in dispute, or involved in the suit, to the Master to be inquired into, which matters the Master reports on, and these are again brought before the Court.

“That it deserves consideration, whether in many suits, the whole of the matters in dispute between the parties, or involved in the suit, might not be disposed of by the Judge, sitting in court or in chambers, as might best suit the circumstances of the case.

“That it further deserves consideration, whether the business of the Court of Chancery might not be distributed between the Judge and the Masters, in some mode better calculated to insure the more speedy and effectual administration of justice.

That it further deserves consideration, whether the judicial duties, which are now discharged by the Masters, should be performed by an officer of court, subordinate in rank and of limited powers.

“That it further deserves consideration, whether a more effectual machinery for taking accounts, and for disposing of the administrative business of the court, than now exists, might not be devised.”

These resolutions involve a very great change. It may be introduced gradually, but ultimately it proceeds on the principle that the Judges of the Court of Chancery, or certain of them, would deal with every part of a suit assisted by the staff of the Master; this is the proposition. The plan is now understood to be under the consideration of the Equity Committee of the Society before whom it was brought; and we shall, no doubt, have further opportunities of discussing it. It would, certainly, enable the Judge to dispose of many more matters in a suit in the first instance than he now does. The unnecessary references to the Master would be at an end. These are pointedly alluded to by Mr. Pemberton Leigh (not, however, as expressly favouring the present plan):—

“The apprehension of affecting the interest of parties in their

absence has introduced another, and perhaps still more crying evil, the endless multiplication of useless references to the Master. The rule upon this subject is unfortunately applied indifferently both to real and personal property. A legacy is given to a class, for instance, to the children of John Thompson. John Thompson and his wife are before the Court, and say, 'We have six children, neither more nor less.' The six children are present, and say, 'Here we are, all brothers and sisters, and we have no other brothers and sisters.' The executor or trustee is present, and says, 'I have known the family all my life, there are six children, neither more nor less.' A witness, or half a dozen witnesses, swear to the same thing — but all in vain. The Judge is incredulous — he says, 'I must have this matter inquired into by the Master;' and forthwith the cause is despatched to Southampton Buildings. Here the point being one about which there is neither doubt nor dispute — about which all parties are agreed, except the Judge — the inquiry occupies a comparatively short time — perhaps not above twelve months — particularly if the parties are fortunate enough to get into the office of my honourable and learned friend opposite, the member for Galway. The Master having looked into the evidence which was before the Court, and probably none other, is, of course, satisfied that John Thompson has six children, and no more; and upon his report the Court is satisfied also. But the cause is to be set down again in the paper, and must wait its turn; and at the end of another two years, if fortunately no change happens in the interval to John Thompson's family, his six children obtain their rights; having waited three years, and paid the expense of an inquiry and a double hearing, without the slightest advantage to any body.

"This practice of referring matters to the Master without sufficient cause, is carried to a most mischievous extent in a multitude of other cases, and has strong recommendations to a Judge, who is more desirous of the credit of despatching business than scrupulous about the mode in which it is disposed of. A cause is got rid of for the day — it disappears out of the paper — it counts amongst the 'causes heard and otherwise disposed of,' and swells the return of business done by the Court. But it is a most false credit acquired, not by despatching business, but delaying it — by denying justice, instead of administering it. The rules, however, having been established, no individual Judge, however much he may feel the grievance, considers himself at liberty to depart from them."

All questions of the nature of John Thompson's children would of course, on proper evidence, be decided at once by the Judge. This would apply to a very large class of cases, and would alone make an enormous saving of time and money.

To this extent, then, we think it will be admitted, that the plan might be tried. But it seems doubtful whether the whole plan of reference to the Master is not erroneous. In all that part of equity business which is judicial, the opinion of the Judge would be better than that of the Master, and is, in fact, in all important points, taken by way of appeal. Is it necessary that two persons should thus be employed? Besides this, is not the plan of written directions in the form of a decree an incorrect mode of procedure, leading to many questions on the construction of this decree? If the Judge had full control of a suit from first to last, might he not in the first instance decide all that could be decided, and might not he superintend any necessary inquiry that arose? Would this be beneath his dignity, or would it, in fact, be impossible? Reference has, on this point, been well made to Chief Baron Alexander. That able Judge was elevated from the Masters' office to the Chief Baronship. Was he, when Chief Baron, less qualified to perform the duties of Master in the suits which he then had to decide? Might he not still have sat as a Judge and in chambers? Might he not have done the duties of a Master?

Many obvious advantages will occur to the learned reader as arising from this plan. It would be alike to the credit as the interest of the Judge to dispose of the suit as soon as possible; if he must decide on a point, he would probably do it as soon as possible, and in the first instance. The Judge would have what the Master is usually found to want, authority to compel the attendance of counsel and solicitors; first, because he would have got them out of their present *track* of non-attendance, and, next, because he would have full power over *costs* in the suit, and thus authority to prevent delay. The plan would also tend to diminish the number of courts, so that, ultimately, instead of five equity courts and eleven Masters, the whole primary business of

the Court of Chancery might be disposed of by six or eight courts, all sitting near each other.

It must not be supposed that this plan would involve an entire and irretrievable change in the present practice of the Court of Chancery. A fair trial might be given to it; and, if it were found not to answer, that it would not *work*, it might be very easily abandoned. Supposing any of the present Judges or any new Judge appointed for the purpose were willing to carry it into execution, it might be tried in the first instance in a single court. The suspension of the appointment of a single Master would be all that was necessary, whose staff would be essential for trying the plan. If it were not found to answer, the judge might either be employed as Master, or be otherwise disposed of, and the present system continued. If it were found to answer, the change might be gradually proceeded with. Four of the present Masters (counting them as eleven in number) might retire, or in case of death or vacancy, their office should not be filled up. Three might be elevated to be Judges on the new plan, and the other four Masters might be left to work out the remaining decrees, and be otherwise employed in matters on which it should be found still desirable to employ them.

The plan need involve no increase of expense. Say that the new Judge were to have a salary of 5000*l.*; assuming that such judge would dispose of as much business as two Masters, who now receive 2500*l.* a year each, the court would cost no more. But it is highly probable that a considerable saving might eventually be made in the *double* staff now employed. We mention this, because we have heard the expense of the new plan insisted on as an objection. We do not think, however, that it is a subject in which expense should be an objection at all.

Nor must it be forgotten that with the larger salary the public would obtain a man of greater energy and ability, who would be selected from a class of the bar, who would rarely accept the subordinate office of Master.

In this rough outline of the plan it is not necessary to enter into details. It has, however, been suggested to us by

a learned person of great experience on the subject, that the following alterations in practice would be necessary under it. Objections to title, now heard by the Master, would be disposed of by the Judge, references under the Trustee Act would be dispensed with altogether, and the trustee would be appointed by the Judge in the first instance. Matters absolutely necessary for the Judge sitting as Master to hear would be matters of account, of pedigree, proof of debts, and in some cases proposals for maintenance and guardianship. All other matters might be heard by the Judge in the first instance. Among others, exceptions to answers might be much better heard by the Judge, as they were according to the practice of the Equity Exchequer.

We have thought it right thus to bring this proposal before our readers. We do not, however, pledge ourselves further to it than to say that it deserves great consideration, and further, that it is supported by so large a bulk of professional favour that we think it deserves, under all the circumstances, that a fair trial should be given to it.

We would willingly offer some further observations on the appointment of an officer to be attached to every suit in Chancery similar to an official assignee in the Bankruptcy matters. But we have already exhausted the limited space which we can give to the consideration of this subject.

We may mention that great alterations are being made as to procedure in Equity in India, under the directions of the learned Judges and the commissioners for the reform of the law.

Sir Erskine Perry, speaking of a case which he had decided after it had lasted fourteen years, says, "there were no extraordinary circumstances connected with it, it was a mere debtor and creditor controversy, and under a simple well regulated system of proceeding it ought not to have lasted six months. If the plaintiff and defendant had appeared in court on the first day of the suit, it would have been evident that a decree referring it to the Master must be made, and three years and a half litigation would have been saved at

once; and if the witnesses had been produced in court on any day or days after the first six months, all the facts on which the case subsequently turned might have been proved, and the same decree made, which it cost *ten* additional years under the present practice to obtain." The Judges have made recommendations, by which they propose taking upon themselves much of the judicial portion of the Masters' duties. Sir L. Peel, the Chief Justice, says, "the office of Master should not be abolished, but its duties could be reduced in importance and difficulty." The changes are not yet completed. The whole account of them is very interesting. Sir E. Perry deserves great praise for the steadiness to which he has adhered to his own very enlarged views on this subject.

While this sheet was passing through the press, an important event in connection with the subject has occurred. The vacancy created in the Masters' Office, by the resignation of Mr. Lynch, is not to be filled up, and the Prime Minister has assured Parliament, that the Lord Chancellor has many important measures connected with the Masters' Office, under his consideration. This announcement gives us sincere pleasure, and does great honour to the Government. The Lord Chancellor, who will apply a substantial remedy to the grievances of the Court of Chancery, will indeed deserve the thanks of his country. The commencement of a large plan of reform, we cannot but think, has thus been made, and we are glad to find that it has given general satisfaction, even to the Masters themselves, who admit that the removal of the taxation of costs and lunacy from Southampton Buildings justifies the making their number less by one.

ART. IX.—JUDICIAL ABUSES IN FRANCE.

WE are now about to point, for the second time, the attention of our readers towards one of the most singular and unaccountable anomalies which can be found in any system of polity; we mean, the mixture of Political with Judicial functions, both in the theory and in the practice of the French Government. At no period of her history, not even in the worst times of the old monarchy, had France more reason to complain of this grand source of corruption, this frustration of all the precautions that can be taken to keep the administration of justice pure. The judges are, it is true, now irremovable, except for delinquency—no longer are even suspected of receiving presents from suitors. But of what avail is it to close the door against corruption in its grosser form, the door least likely ever to be entered, when the other avenue is left wholly unguarded,—the access of political influence altogether made free? The Judges are suffered to be candidates at elections themselves; they are allowed to canvass for their friends; they are permitted freely to use their influence for the election of their relations; they may even employ their official influence; the patronage vested, and most improperly vested in them as magistrates, in order to secure the votes of electors in their own, or their family's favour. A recent occurrence of necessity directs our attention to this matter, and we trust that we do not go beyond our province when we most earnestly implore the attention of others alone powerful to redress the wrong; we mean the Government of France, and more especially M. Herbert, the learned and able successor of the most incapable person who ever filled the office of Minister of Justice, M. Martin, as he was pleased to call himself, Du Nord, who has ceased to incumber that place. Now he has left the scene of his misconduct, and we may at length hope that

some of the mischiefs which he did to please his patrons and flatter the court, will be remedied by his successor. But, furthermore, we venture to express our confidence in the good intentions and great sagacity of the French monarch and his confidential advisers, that they will at length purify their judicial system from the most grievous of all contaminations, the foul taint of Political Judges. In this frame of mind we are encouraged to proceed, and to state our case. It is a sad one.

The President of the Court of Cassation (Premier President) is the highest of all the judicial functionaries of all the magistrates in France. This court, of three chambers and fifty-two judges, decides in the last resort, by appeal, on matter of law coming for review from all the numberless tribunals in the country. Its ample jurisdiction embraces criminal as well as civil law ; extends over all prosecutions, as well political as others. The limits of all inferior jurisdictions are within its cognizance. If a question arises whether one tribunal or another had cognizance of any cause, the Court of Cassation decides. If error in law has by any court whatever been committed, the judgment is reversed, or is altered by this highest tribunal, or a new trial may be ordered, and to be had in whatever district it shall please to direct. Over the conduct of all magistrates, all judges, it exercises superintendence and control ; where faults have been committed by judges, it denounces and obtains their redress, or their punishment. Of this great body the First President is of course the head, and he receives a very much larger salary than any other judge of the realm. Generally speaking, he is a Peer of France.

The Count Portalis, son of the late respected minister of public worship, fills the office of First President at the present time, and has done so for many years. He is a man generally respected for his learning and capacity, generally beloved for his amiable manners. The system is the object of our blame, and not the man, for he has probably done little more than others would do in his place. The Count is a peer of France, and cannot, of course, be elected to the Chamber of Deputies ; but his eldest son, the Viscount de

Portalis, was a candidate for Toulon at the late general election. He was returned, and he died a few days after, exhausted by the fatigues of a canvass and a contest in the sultry climate of Provence. Immediately the family of Portalis, notwithstanding their mourning over so melancholy and so unexpected a loss (for the Viscount was in the flower of his age), arrived on the spot, with the First President at its head, to look after the electoral succession; for they set up the next brother of the deceased, a young man in an obscure official station at Paris, and wholly unknown as well in the capital as in the province. But the father was well known in both, and he remained for more than six months on the spot, having arrived early in September, and returned to the discharge of his high judicial duties late in March.

If any one were to tell us that his absence from the Court of Cassation was accidental, we should be somewhat astonished. If any one were hardy enough to suggest that his residence near Toulon had no connection with the election of his son, we should stare more wildly still. If any one were to screw up his courage to the point of denying that Count Portalis interfered at the elections of October and March (for there were two, as we shall presently see), our incredulity would nearly extend from the denial of the advocate to the evidence of our own senses; for we could not believe it possible that any man should dare to hazard such an assertion. No, no: Count Portalis left the Court of Cassation in order to further his son's election at Toulon; he remained there wholly neglecting his judicial duties, for the sole purpose of assisting in the canvass by every means in his power; and by every means in his power—by letter, by visit, by promise, by application for places, including judicial places—he did, to the best of his great influence, promote that election, so that his second son was returned in the room of his eldest: what other means were employed by the canvassers, what use was made by them of the Count's name, we do not choose to state.

But the return was disputed, and the election set aside. It was found that the young man had not attained the age

which the law requires. On this ground the election was annulled. How happened it that the father was ignorant of a fact far better known to him than to any other person in all the world? Ignorant he was not, ignorant he could not be; but he chose to withhold his knowledge, he chose to conceal the clear incapacity;—he a judge, who would most surely have censured any party before his court for such an act, kept secret a fact which he was aware would defeat the party whom he favoured; he, the [first Judge in France, joined in a conspiracy to pass a fraud upon the electors of Toulon and on the Legislature of the country; he, a Peer of Parliament, Chief Justice of all the realm, practised a deception for which he must have visited with his most grave rebuke, if not with penal infliction, any party found guilty of having committed it, in a trumpery bargain about goods, a disputed election to the most insignificant corporate office—a deception injurious to the electors of a great district and the Chamber of the Representatives of the Realm. This is the consequence, and it is the inevitable consequence of Judges becoming candidates, and interfering as the friends of candidates. They unavoidably mix themselves with the zealots of their party, become careless of all decorum, unscrupulous in their choice of means, ready to embrace all expedients, to use all shifts, and willing to gain the day, to win the game, at any sacrifice of dignity, at any cost of profligate conduct. We may blame count Portalis, but we must recollect that what he did arose naturally from his position, both as chief Judge and an electioneering party; we must reflect that to draw the line at a contest is impossible, that no law which suffers a Judge to be a candidate, or the patron of a candidate, can prescribe what acts incident to the position shall be permitted, and what shall be forbidden as inconsistent with the dignity of the Bench.

We have said that we trusted no very undue use was made of the First President's name in the course of the canvass. We are not, however, at all sure of this; and we know that in other similar instances such a use has been made, and most shamelessly made, by the canvassers, if not of the

Judge's name, at least of his high office. We have been assured by most credible witnesses, that the friends of candidate-Judges have plainly intimated to voters who refused to give the Judge their suffrage, the risk they ran if they should abide by their refusal, "Vote as you please," was the form of expression; "but remember you had better have no transaction before the Judge afterwards." Can any one, how little soever versed in the practices, or acquainted with the arts of the electioneering profession, hesitate to believe that such a use of a candidate's name and station is absolutely inevitable? Who that has ever seen the rules of canvassers, and heard their speeches, half-wheedling, half-threatening, to voters, can doubt their readiness thus to make use of the candidate's official influence? "Lord So-and-So has much church preferment; you are a young and an embarrassed clergyman:" or, "You have a son in the Church, and his Lordship may be a good friend." This happens every day among ourselves. And any horror of the simony that lurks under all such fair speeches does not close the canvasser's mouth. Then why should any strict regard for the purity of the ermine more quench the fervour of the partisan, than does a tender care of the Church's purity abate the same partisan's election zeal? We fully credit all that we have heard on this painful subject, both because the statements are in themselves highly probable, and because we trust the accuracy of our informants. Nay, a step further we might go, and declare that, without any testimony to the fact as having actually happened, we are thoroughly convinced that it must have happened in a hundred instances at least, for one which has been described by eye-witnesses.

To proceed: The election of M. Ernest de Portalis 11th October, 1846, was set aside by the Chamber of Deputies 20th January, 1847, and a new election took place 24th February. The First President continued to take a lively interest in the Toulon politics. He prolonged his stay until 16th March, and it is a remarkable fact that the judicial appointments (*parquet*) of the district were reserved during the interval between the 11th October and 27th February,

without the usual, indeed the almost necessary report of the Procureur-General of the Department. But M. Borelli who filled that high office, is a man of profound learning and of the most strict integrity—one who abhors all intrigue, and who, above every thing, shudders at any thing that approaches to judicial corruption.

It is another fact that, for many months during these elections, judicial places were carefully kept vacant after the decease, resignation, and removal of the functionaries; and equally striking is the other fact, that, between the vacancy on Viscount Portalis's death and the return of the First President to Paris in March, not a single judicial vacancy was filled up, except by the influence of that powerful magistrate.

That the newspapers have not dwelt on these things will surprise no one who remembers our statement in a former number¹ on the tendency, and indeed the undeniable effect of Martin du Nord's subtle scheme to bring under the influence of the bench all the journals of each province. The boon for subserviency, the *annonces judiciaires*, is bestowed yearly by the courts of law; and no journalist who regarded the interests of his paper, was likely to risk them irretrievably by a quarrel with the first magistrate in the kingdom.

Now we ask, not only any one who has studied the principles on which the judicial system ought to be framed, but any one who has ever given a moment's reflection to the primary object of any such system,—a maintenance of purity and impartiality in the dispensers of justice—and, to what is the next object (an object generally attained with the first, and never attainable without it), the preserving of the judicial character unsuspected as well as pure,—if it is possible to conceive any thing more surely calculated to defeat both these great objects than such proceedings, perfectly legal and wholly constitutional in France, as we have just been occupied with contemplating? We enter not into any of the other matters which have reached us; we say nothing of the

¹ 1 Law Review, 432. *et seq.*

statement so confidently made, that a positive, even an insolent, refusal was returned by the First President when an invitation was sent, very civilly asking him to resume his attendance at the Court of Cassation. Other matters, not inevitably springing out of the bad system, we pass over for the same reason, namely, that we wish to consider only the errors of the system itself, and therefore we lay out of view whatever belongs not necessarily to its operation. But surely enough has been said to show the absolute necessity of a change. No one can doubt that in a country where such things as we have been considering can happen, nay, do happen, every general election, there is, there can be, nothing which deserves the name of a sound judicial system, nothing which can be called a pure administration of justice. It is most essential to the reputation both of the French constitution and of those in whose hands is vested the administration of its powers, that the knife of the reformer be fearlessly applied to prune every such excrescence and we humbly, but confidently, hope that the salutary process will, before long, be effectually performed.

ART. X.—ARREST ON MESNE PROCESS.¹

1. *Report of the Committee made to Merchants and Traders at a Public Meeting held at the London Tavern, 23rd February, 1847.*

ON the 3rd of May, 1842, a public meeting was held at the London tavern, to consider the law of debtor and creditor,

¹ We do not pledge ourselves to all the opinions contained in this article.
—Ed.

when a committee was appointed to obtain an amendment of the law of bankruptcy and insolvency. A second public meeting was held on the 27th of May, 1845, when the committee was re-appointed. On the 16th of February, 1846, the merchants and traders of London met a third time, and on that occasion one of the speakers made use of an expression which was received with an universal cheer of assent. He said, "Creditors are an *outlawed* class." On the 27th of February last, the merchants and traders met a fourth time to receive the report of their committee; and having heard the report read, they passed several resolutions, the 2nd and 4th of which were in these words:—

"2nd. That it is the deliberate opinion of this meeting that the existing bankruptcy and insolvency laws are a disgrace to our age and country. That, under their shelter, deceit, reckless trading, extravagance, dishonesty, and every species of fraud, may be practised with impunity; the debtor is demoralised and the creditor unprotected. That this impunity is steadily undermining the commercial morality of the country; that it is unjust in reference to society in general, and to the industrious classes in particular. That, under this protection, a profligate dealer, after destroying the fair trade of a district and ruining all in his neighbourhood, may, in effect, recommence business, and repeat his iniquitous course in another, or even in the same district, with scarcely a possibility of his reckless career being stopped by the arm of justice, or of any punishment being inflicted upon him for the ruin he has entailed on others.

"4th. That it be a special instruction to the Committee to demand, as an act of necessary protection to the trading interests of this country, the re-enactment of the law of arrest upon mesne process, with due precautions against its abuse, and also of imprisonment for debt; always affording, however, facilities for the protection of the unfortunate debtor, but securing certain and speedy punishment to the fraudulent and dishonest.

These resolutions attribute the evils which afflict the mercantile community, to their true cause, the abolition of arrest on mesne process, in 1838; and they disclose the true

remedy, which is twofold: first, and this, perhaps, is the most important, the making of a better provision than now exists, for the protection of the *honest*, though unfortunate debtor; and, secondly, as against the *dishonest*, the re-enactment of the law of arrest, with proper precautions against abuse.

I. As to the honest debtor.

We admit, that the class of honest debtors is at present a very small one; but why is this? Is it because there is little or no honesty in man? No; but because an unjust law makes a man a knave, who, under a better law, would act honestly. Wrong begets wrong; whereas, if you respect the rights of others, they will respect your rights. Modern legislation has undoubtedly adopted some new principles on the subject of debtor and creditor, which are in accordance with justice and common sense; we allude to the laws of 1842 and 1844, enabling all debtors to bring their own cases before the proper court of justice, and procure protection for their persons on surrendering their property; but even those laws, though they are most valuable, as recognising the right and impliedly asserting the duty of debtors to originate the proceedings against themselves, do not go far enough; because they offer no relief to the debtor, *however honest*, unless clogged, first, with the condition of his gazetting himself in the first instance by a name which in common parlance is considered synonymous with knave, that of bankrupt or insolvent; secondly, his inviting a messenger of the Court of Bankruptcy to enter his premises and seize his property, as though he were too great a knave to be entrusted with the temporary custody of it himself; and thirdly, the suspension and consequent destruction of his business. Whilst deterred by such cruel conditions as these, it is vain to hope that any debtor, however honest, will look his difficulties fairly in the face at the proper time; it is vain to hope that he will not struggle to the last, and, whilst sinking, sacrifice his

creditors' property for temporary accommodation amongst those money-lending harpies, who are ever at hand to watch the struggles of a sinking tradesman and take advantage of them.

This treatment we deem equally harsh and impolitic. We have often thought on this subject, and as often as we have done so, a face has presented itself to our view, which still remains deeply impressed on our recollection as a speaking picture of perfect honesty and deep distress. The person we allude to had for many years carried on business in Piccadilly, as a cork-cutter, and with the profits had brought up a large family most creditably. In an evil hour he took a son into partnership with him. The son got into bad company; and, to supply his extravagances, gave partnership acceptances, which suddenly came on the father. The son fled. The father submitted to his misfortune, and became bankrupt. His business was destroyed, and he was ruined. Let each man who reads this statement, ask himself what, if such had been his own case, he would have wished that the law would have enabled him to do. Would he have wished that his only remedy should have been to get the concurrence of every creditor, even the most hard-hearted and selfish, in a fair private arrangement, or, on that resource failing, to have had no alternative but that of gazetting himself by the odious name of bankrupt, which involves the immediate destruction of his business, and the intrusion of a messenger's man into his house and family? No: he would, we are sure, have wished that the law furnished some process under which he would be able to call his creditors together, submit his whole conduct and the state of his affairs to a fair investigation, and abide the result for good or evil: to be condemned in character and ruined in his business, if his explanations were unsatisfactory; but to remain untainted in character, and comparatively uninjured in business, if his explanations were satisfactory. Does the law, even with all its modern improvements, furnish such a process? No. Then we say it is still imperfect. At the time when the poor cork-cutter became bankrupt, the

law was so absurd that it would not have permitted him even to make himself bankrupt; it left him at the mercy of each of his creditors. In 1844 the boon, the great though insufficient boon, was conferred on the debtor of being able to originate the proceedings against himself. The truth was recognised that a debtor has as good a right to call his creditors before the judge to hear his statements, as they have to drag him before the judge and force him to make them. But though that truth is recognised, it is clogged with the unjust condition that he should begin the process by stamping on himself the offensive name of bankrupt, to which he clearly ought not to be subjected except as the end, not the beginning, of investigation, and then only if he deserve it.

This is the greatest blot on the existing system; and until parliament recognises it as a practical truth, that he who declares his own insolvency shall be taken, *primâ facie*, to be a man who means honestly, and that he shall be treated accordingly until it appears that he is undeserving of consideration, the law never will be on a good footing. No doubt it will be some time before the knavery imported into human nature by the errors of the old system will be rooted out, but we need not despair; as ill-usage begets knavery, so kind and considerate usage will by degrees produce honest conduct. Our plan, therefore, would be to provide that any debtor should be at liberty to attend the court, and declare himself unable to meet his engagements, which should be an act of bankruptcy, of which any creditor could avail himself to proceed under the ordinary law of bankruptcy in the event of his being able to show to the court any fraud committed or contemplated by the debtor; that on the debtor's declaration an advertisement should be put in the Gazette, stating that the debtor was desirous of laying the state of his affairs before his creditors; that he should then be referred to an official assignee to make out his accounts; that his creditors should meet and choose assignees, none being allowed to vote in the choice except those whose proofs were supported by entries made in books kept according to the usual course of business; that as soon as the accounts were

prepared, the debtor should file them, and swear to their truth; that on the basis of those accounts, so authenticated by oath, the debtor and his friends on the one side, and the assignees on the other, should be at liberty to negotiate; and that, if the debtor and the assignees could agree on any plan of arrangement, a day should be fixed, on which all parties should be warned by Gazette, to attend before the commissioner, and state any objection to the arrangement; and if no sufficient objection were made, the arrangement should be confirmed and carried out. If the assignees should be of opinion that it would not be for the benefit of the creditors that the debtor should be allowed to resume his business, the property would be sold, and the proceeds would be distributed in the usual way, the debtor being entitled to his allowance, &c. This method of proceeding would of course involve neither the stigma of bankruptcy, the destruction of the business, nor the very offensive measure of thrusting a servant of the law into the debtor's premises to seize the property; and it would prevent that which is now of daily occurrence, the cruelty of one creditor prevailing in opposition to the kindness and consideration of the body in inflicting on the debtor the disgrace of bankruptcy. It would also control the individual creditor's rapacity, and prevent his extorting unfair terms for himself alone. Of course, if, in the course of the inquiry, it turned out that the debtor was undeserving of consideration, it would be open to the Court, on the application of the assignees, or on that of any creditor showing fraud, to declare the debtor bankrupt, and proceed under the law of bankruptcy.

To such a system as this, often as we have reflected upon it, we never could see the smallest objection; and, as it seems to us, it would entirely meet the views of the City Committee, to which they alluded, when, in their fourth resolution, they spoke of "affording facilities for the protection of the unfortunate debtor." Our wish is to go beyond the exact idea expressed by that language; for we wish, not merely to protect him in the ordinary sense of protection, that is, from arrest, but to protect him even from disgrace. A system of

protection founded on these principles is, and always has been, the great desideratum of the law. The law has never recognised the great truth, that some debtors, who do not pay, are just as honest as those who do. It has never attempted to separate the sheep from the goats, the unfortunate from the knavish; the debtors who have struggled for a living, and have failed, from those who have never struggled for a living at all, but have thought—and with too much reason—that that species of thieving, which the Law kindly calls insolvency, is much more profitable, much less hazardous, and followed, when detected, by consequences much less disagreeable, than burglary, shoplifting, petty-larceny, &c. &c. Until this deficiency is supplied, the rest of the law of debtor and creditor will never be on a good footing. It is to this point, therefore, that the judicious reformer would direct his principal attention, for, till he has guarded himself at this point, till he can say to the sentimentalist, “The object of your anxiety can pay, or he cannot: if he can pay, he ought to do so; if he cannot pay, why does he not avail himself of the humane provisions of the law, under which, if honest, he can get relief *without disgrace*?” he will never succeed in restoring the only process which is worth one pin to the *honest* creditor — arrest.

But besides these reasons of justice and policy for protecting the honest debtor, even from disgrace, there is another, more stringent still, which is, that the present law constantly furnishes an excuse to a dishonest debtor for not being able to produce all his books and papers. Until 1844 his excuse was excellent. Since 1844 it is not quite so good, though it is still plausible enough. Until 1844 the excuse was, “I was afraid I should be arrested. I could not make myself bankrupt and procure protection for my person, so I was obliged to conceal myself, and, whilst I was away, some person took away my books. I left them safe, but what is become of them now I don’t know.” In 1844, traders were enabled to take out fiats against themselves, and therefore, since 1844 the excuse for books vanishing is not quite so plausible. But even now it is plausible

enough; for still the debtor can say, with much show of reason, — “I could not bear the thought of gazetting myself a knave; I could not bear the thought of having a messenger’s man thrust into my premises; I still hoped that I could make some private arrangement with my creditors, and avoid disgrace. Meanwhile I left home to avoid arrest, and during my absence some of my books vanished.” The wise reformer would take this plausibility out of the knave’s mouth, by giving the honest man protection without disgrace. That done, all difficulty in separating the wheat from the tares, the wolves in sheep’s clothing from the sheep would vanish.

II. As to the dishonest debtor.

Assuming such provision to have been made for the honest debtor, let us see whether there would then be any pretence for the Legislature denying to the creditor the power of arrest on mesne process. We put aside imprisonment for debt. Imprisonment for debt is, we admit, an absurdity. Imprisonment for debt means imprisonment to make a man pay a debt, and that is clearly not the proper mode of attaining the object. The proper mode is to enable the law to get at the debtor’s property; and this can only be done by declaring him bankrupt, and taking the most active measures to ascertain what his property consists of, and seizing it. This may be easily done. All property is divisible into two classes: one, which the lawyers call “choses in possession;” and another, which those gentlemen call “choses in action;” in more intelligible language, all property is divisible into things which a man has on his premises, or about his person, under his own guardianship; and things which are not about his person or premises, but are under the guardianship of another such as money at his banker’s, goods at a warehouse, debts, &c. &c. Now with regard to all those things which he has about his person or premises, the way to seize them is to call in the servants of the law, and take them by main force; and with regard to those things which are under the guardianship of others, the way to obtain them is to publish the right of the assignees, to publish it in the Gazette, publish it in the newspapers, publish it in courts of justice, pub-

lish it by private notices, in short, publish it by every means which ingenuity can devise, and then make those who have it in their custody responsible to the law for its value, if they presume to account for it to the bankrupt, or to any person but the proper officer of the court of justice. This method of proceeding, backed by the power which the Court already possesses, of sending for persons and examining them on oath, and sending for books and papers and inspecting them, is amply sufficient to enable the Court to discover and possess itself of the whole property of the bankrupt. Imprisonment *for debt*, therefore, is an useless cruelty. If there is to be imprisonment under execution, it should be for one of four things :—either because the debtor knew, at the time he incurred the debt, he would not have the means of paying when the day of payment arrived ; or because he obtained credit by some fraudulent misrepresentation ; or because he has enabled one of his creditors to seize all, to the disappointment of the rest ; or because he pertinaciously refuses to render such accounts as the Court requires of him, or to answer questions which he ought to answer. In all such cases, no doubt, he ought to be imprisoned ; but though the imprisonment would be, *in form*, imprisonment *for debt*, it would be, *in substance*, imprisonment *for fraud* or *contumacy* ; the imprisonment should be a penal one, and the culprit should be subjected to prison diet, and the ordinary prison discipline. -

But rejecting, as we do, imprisonment for debt after judgment, we profess ourselves the most eager advocates for arrest on mesne process. It may be said, if you are against imprisonment for debt after judgment, why should you be in favour of arrest for debt before judgment? arrest for debt is imprisonment for debt. We answer, because arrest for debt is cheap and effectual ; and imprisonment for debt is expensive and useless ; that is, useless to enforce payment, though valuable as a means of punishing delinquents, if necessary. Arrest for debt is cheap and effectual ; because, instead of being like imprisonment for debt, the end of an absurd and useless law process, it is the beginning. It has all the efficacy and none

of the defects of imprisonment. It need not cost more than the merest trifle; for all that would be required would be, that the creditor should make out his account in the common mercantile form, and attend, with his attorney, before a Commissioner of the Court of Bankruptcy, and swear to the truth of his account, and produce his books and papers to verify it. There would be no nonsensical declaration, no lying plea, no ridiculous replication, none of that stuff which lawyers call making up the record, no preparing of briefs, no feeing of counsel, no summoning of juries, no calling of witnesses, no recording of a verdict, no entering up of judgment, and no issuing of execution and inviting the sheriff to come and help you, which he scarcely ever can do, because the defendant must be a very foolish fellow indeed, if, whilst all this solemn farce is proceeding, he does not slip the pea under another thimble by that legal device, or thimblorig, a bill of sale. All these proceedings are well enough, perhaps necessary, where there is really a question to be tried; but, in cases of debt, there is no question to be tried, in forty-nine cases out of fifty. The only question is, how long the debtor can keep his creditor at bay, and how much additional time he can gain for robbing and cheating other people, by delaying the public exposure of the way in which he has treated the creditor in question. The way to prevent the debtor from succeeding in this nefarious object is, to give the creditor the power of arrest.

But then it may be said, If arrest is so valuable a process, how came it to be abolished in 1838? We answer, that it was condemned as innocent people have sometimes been for keeping bad company. It suffered, not for its own faults, but for being so nearly related to, and so closely connected with, imprisonment for debt. It must, however, be admitted that it had some faults which required correction; one was, that proper precautions were not taken to prevent the possibility of a debtor being arrested wrongfully; another that the debtor was not instantly brought before the Court, and encouraged to make reasonable offers of arrangement with his creditor; and a third, that, if really insolvent, he was not permitted to declare himself so, subject himself to the

law of insolvency, and procure instantaneous release. Correct these errors, and the law of arrest will be found a faultless law. To correct the first error all that is necessary is to provide that the same course shall be pursued under the law of debtor and creditor, which has always been pursued in Chancery in injunction cases, and under the criminal law in cases of accusation; that is, require *a court* to institute an *ex parte* investigation before issuing the order for arrest. In Chancery, if a plaintiff wants an injunction, he does not merely make and file affidavits, and get his injunction, as matter of course, *from an office clerk*; he opens his case to the Court, and the Court exercises its discretion. Under the criminal law a prosecutor does not merely file affidavits and obtain a warrant of arrest *from an office clerk*; he goes before a magistrate, opens his case, and the magistrate exercises his discretion. The same course ought to have been pursued in matters of arrest for debt, but the judges really had not time to do their duty. They therefore said, File the affidavit, and *the office clerk* will give you the writ. They would not exercise discretion. And what was the consequence? Occasionally very great abuses arose. Persons were arrested without the smallest foundation in justice. What is the remedy? the requiring that in each case discretion shall be exercised. And who ought to exercise it? evidently the members of that Court, whose sole function it is to deal with the law of debtor and creditor — the Court of Bankruptcy. Nor would it be possible to find fitter depositaries of the trust; first, because the duty would be exactly the same as that which they daily perform in inquiring into a petitioning creditor's debt in bankruptcy; and secondly, because their time is confessedly not fully occupied. It may be said the commissioners may err, and may permit wrongful arrests: this, however, is not likely; because the commissioners might be directed to refuse the writ in *doubtful* cases; and it is notorious, that scarcely an instance can be found of their having come to a wrong conclusion in inquiring into the sufficiency of a petitioning creditor's debt to found a bankruptcy. Of

course, the debtor, when arrested, would be at once brought before the commissioners. If he were under temporary difficulties, he might state his case on oath; and the commissioners might grant him such delay as the circumstances, so stated, would warrant; or if he were really insolvent, he might declare his situation, and take the necessary steps for bringing his case before his creditors generally. Under such a system as this, arrest for debt would be incapable of abuse; and by bringing the parties face to face in the presence of the Judge, it would lead either to payment, or to the giving of time, or to that general arrangement which, in the vast majority of cases, is the best mode of providing for the difficulties of the case.

Many arguments have been used to prove that imprisonment was ineffectual; one of the most familiar was taken from the records of the Insolvent Debtors' Court, by which it appeared that very few indeed of the persons actually imprisoned, and whose cases came before that Court, paid any portion of their debts. We admit this. We cannot deny it. But it must be remembered, that it is not *actual* imprisonment, but the *fear* of imprisonment, which is the cause of debts being paid; and the fear of imprisonment cannot exist in the millions of cases in which it produces its effect, unless actual imprisonment exists in the few cases in which it is ineffectual. In those cases it is a necessary evil, in order that the good may result in the other cases. We must bear a little evil for the sake of an enormous good; according to the Roman maxim, *Pœna ad paucos, metus ad omnes* — some must suffer, that all may *fear*. We have now lying before us a vast number of returns from superior and inferior courts, all establishing the same truth, that there are thousands of cases where the debtor is unwilling to pay, but does pay when sued; and that in but very few of those cases is it necessary to resort to actual imprisonment. We select from amongst many the following return, relating to the Court of Requests for Broseley, in Shropshire, the jurisdiction of which extends to forty-shillings, which can imprison for six weeks only.

9152 Orders for payment of debts were made in Broseley Court of Requests, between August 9, 1838 and August 9, 1844.

4036 of those orders were disregarded and executions ordered to be issued.

1629 of which executions were against the goods, and

2407 executions against the body.

63 persons only remained the allotted time (six weeks) in gaol out of 2407, and

22 remained in prison from 2 to 28 days, and were then liberated on payment of debt and costs.

This return shows that within the small radius of this petty Court of Broseley, there were in six years no fewer than 9152 persons willing enough to cheat their creditors, and who were deterred from so doing by the existence of that power of imprisonment which was actually executed for the full period against sixty-three persons only, that is, against only ten persons in the year; and, if so, can any man doubt the futility of an argument which, being founded exclusively on the inefficacy of the actual imprisonment in the sixty-three cases, totally neglected the efficacy of the fear of it in the 9152 cases? It may be said that the 9152 yielded lest their goods should be seized. To this we answer, abolish process against the person, and the debtor will never hesitate to transfer his goods into another man's name. If the debtor knows that the creditor can seize his person, if the goods are transferred, he hesitates to transfer his goods, lest his body should be seized. Remove this latter fear, and process against goods will become a subject of ridicule and contempt only.

There is also a tabular statement, to be found between pp. 87 and 105 of the report made in 1832 by the Common Law Commission, which leads to the same conclusion. It there appears, that upon 403,133 suits instituted in the year 1830, 17,220 persons only were actually imprisoned, of whom the greatest number were probably released after a very short imprisonment; for 10,142 were imprisoned by inferior courts, which can only imprison for a limited time. Can it be doubted, that it was the actual imprisonment

of the few that struck a wholesome terror into all? nay, can it be doubted, that the effect of the imprisonment of the few extended, not merely to the 403,133 against whom writs issued, but to the whole community? The law is the greatest of teachers, and a law that makes wrong doers suffer, fortifies the proverb, "Honesty is the best policy."

All the other arguments were either founded on fallacies, or have no application to arrest, on mesne process, which is the process we are advocating, the practical value of which is universally attested by practical men. We will conclude with citing from a mass of similar evidence, collected by the Common Law Commission, the evidence of the present Secretary of Bankrupts, Mr. William Vizard:—

"I do not inter into the question, whether it be right or not, that in any case personal liberty should be sacrificed in satisfaction of or as a security for a civil debt. But if there is to be an arrest for debt, my practice satisfies me that to hold to bail on mesne process is, generally speaking, not less mercy to a defendant, than justice to a plaintiff; I have seen continually, that where a defendant is served with a writ and not arrested, as he feels no immediate pressure, he pays no attention, until at last he is taken in execution with an accumulation of costs, which in such cases often exceed the amount of the debt; and that frequently the creditor thus not only loses his debt, but has also to pay all the costs incurred, from the inability of the defendant to pay the amount, whereas if the defendant had been pressed in the first instance, he would readily have paid the smaller sum which constitutes the debt. For this reason I have often advised a creditor to submit to the loss of a small debt rather than proceed at all, unless he could hold the defendant to bail. I believe, nevertheless, that creditors will generally proceed and take their chance of recovery, and that costs will therefore be multiplied if arrest on mesne process should be abolished."—Fourth Report on Common Law Courts, printed 6th March, 1832, p. 69.

ART. XI.—THE NEW REAL PROPERTY COMMISSION.

AN important event connected with the reform of the law of Real Property has occurred since we had last occasion to address our readers on that subject. A new Real Property Commission has been appointed, which we have long considered a necessary step.¹ The Commission² is directed to Lord Langdale, M.R.; Lord Beaumont; Joseph Humphry, Esq., Q.C.; Henry Bellenden Ker, Esq., and Walter Coulson, Esq. Barristers; and George Frere, Esq., and Francis Broderip, Esq., Solicitors; and after reciting that the Select Committee of the House of Lords on the Burdens of Land [1846] “have reported that they are convinced that the marketable value of real property is seriously diminished by the tedious and expensive process attending its transfer; that they are anxious to impress on the House the necessity of a thorough revision of the whole subject of conveyancing, and the disuse of the present prolix, expensive, and vexatious system, and that a registry of title to all real property is essential to the success of any attempt to simplify the system of conveyancing, and they have therefore recommended the improvement of the law of real property, the simplification of titles and of the forms of conveyance, and the establishment of some effective system for the registration of deeds;” the Commission appoints the Commissioners (naming them), “or any four or more of you, to be our Commissioners for making a full and diligent inquiry, whether the burdens on land can be diminished by the establishment of an effective system for the registration of deeds and the simplification of the forms of conveyance, and by what means the same can be effected.”

¹ See 1 L. R. 169.; 5 L. R. 417.

² A copy is given in the *Jurist*, Feb. 27.

It will be seen that the duties of the Commissioners are somewhat limited; they are not directed to consider all the subjects recommended by the Lords' Report: "the simplification of titles" seems omitted. Their attention, it would seem, is to be confined to the means of effecting the registration of deeds and the simplification of the forms of conveyance. These words are of considerable importance, if intended to have a restrictive effect. We have already given our reasons at great length for our opinion¹, that the simplification of titles is by far the most important step that can be taken in conveyancing reform. If by a registration of deeds is meant simply an additional ceremony to deeds and other instruments, (attended though this be with many great advantages), we are quite satisfied that this will not, and should not, satisfy either the profession or the public. This will do little to remove the "tedious, expensive, and vexatious system attending the transfer of land:" this will not effect that "thorough revision of the whole subject of conveyancing" which the Lords call for, nor will it materially raise the "market value of land." The Commissioners, we cannot doubt, will be prepared to recommend much more extensive measures; measures which will, in fact, simplify the mode of transfer, and disincumber it of the present expensive inquiries into title. We shall, however, be prepared to receive their recommendations, not only with great respect, but with all that favour which the honest opinion of men placed in a difficult position should fairly receive. The public is greatly obliged to them for undertaking this duty, which some others from various motives declined. They have a great responsibility thrown upon them: we doubt not that they will prove adequate to the discharge of it. Of this we are sure, that the subject of real property reform is no longer one that is to be discussed as a matter interesting only to the speculative and the curious. The community at large, on both sides of the Channel, is beginning to understand it, and while many wild notions are afloat respecting it, yet the plain and downright truth is finding its way into the minds of the great body of reflecting men.

¹ 5 L. R. 400, *et seq.*

If then the necessary measures are proposed, they will put to flight many vain and idle speculations ; but if any half-measure is attempted, there is ample power to put it aside. There is this great advantage in the present Commission : it has not been appointed too late.

While on this subject we may mention that an important bill has just been brought in by the Lord Chancellor "to facilitate the sale of incumbered estates in Ireland." By this bill, any person having a life or any greater estate in lands subject to any incumbrance, or any incumbrancer, may contract for the sale of such lands, and carry such sale into effect by means of the Court of Chancery. For this purpose he is to present a petition to the Lord Chancellor, who may, without requiring the attendance of counsel, refer it to one of the Masters, who shall inquire into the particulars relating to the land contracted to be sold, and report thereon to the Court. For this purpose the Master is to give notice to all persons who shall appear to have any interest, and he shall state in his report by whom he has been attended. On the report being presented, the Court may, under certain restrictions, order a sale. The assurance of the land to be sold shall be made in such form as the Master shall direct ; the Master shall execute the same, and *execution by any other party shall not be necessary for its validity*. But the Master may direct any other person to execute the same for the purpose of covenanting for title, or for the production of title deeds, and the same shall operate as a conveyance or assignment valid against "all such persons," and free from all such estates and incumbrances as in the order of the Court under which the sale shall have been made shall be expressed. The purchase money is then to be paid into the bank, and the receipt of the Accountant-General is to be a sufficient discharge.

The effect of this act is to give a judicial title to the land (thus recurring to the practice of our Anglo-Saxon ancestors), and to charge the purchase money with the incumbrances. We approve of the principle of this bill, and more especially as applicable to Ireland. But we have some doubts as to whether it is efficiently carried out as it now stands. Supposing any incumbrancer in possession of the deeds de-

clines to go before the Master or to deliver up the deeds, may he not effectually stop all proceedings under the act? and is it not exceedingly likely that an incumbrancer will take this course for his own safety and protection? We think some power should be given to the Court to insist on the production of the deeds, for the purpose of seeing whether the case is within the jurisdiction of the Court.

Again, clause 25.¹, the most important of all, appears to us to be obscurely drawn. The assurance is to operate as a conveyance valid against all such persons, and free from all such incumbrances as on the order of the Court under which the sale shall have been made shall be expressed. We apprehend this is not intended to authorize a conveyance valid against all the world. Yet some such power, under some restrictions, must be given to the Court, or the act will be a dead letter. Plenty of money will flow into Ireland for the purchase of land, if it is not there already, on one condition—perfect security of title. But without this, although there may be many petitions under the act, thus plunging the estates into chancery, and thus further distressing the already sufficiently unhappy owners of land, the sales will be exceedingly few. It is, therefore, of the greatest importance that facility of sale and security of title should be insured by the proposed bill; and we respectfully submit these observations with the hope of carrying out the principle of the bill effectually, which a few simple alterations will accomplish. If these are not made, we very much

¹ "And be it enacted, that the assurance of the land or estate sold shall be made in such form in all respects as the Master shall direct, and that the Master shall execute the same, and execution thereof by any other party shall not be necessary for the validity thereof; nevertheless it shall be lawful for the Master to direct or authorise any other persons to execute the same for the purpose of covenanting for title, or for the production of title deeds or otherwise, and the same shall operate as a conveyance and assignment valid against all such persons (and those claiming under them), and free and discharged from all such estates, incumbrances, and charges, and also subject to all such incumbrances and charges, by way of apportionment and otherwise, as in the order of the Court under which the sale shall have been made shall be expressed or directed; and the assurance shall be made to the purchaser, his heirs, executors, administrators, and assigns, as the case may be, or as he shall direct."

fear that this bill will share a fate similar to many other Irish bills—that of being found in the statute-book, but heard of nowhere else.

We have another apprehension connected with this bill: that, as it is to be practically worked out in the Master's office, the just odium which rests on that office, as well in Ireland as in England, will deter persons from availing themselves of its provisions. All persons acquainted with Irish titles must know how many persons having interests and incumbrances would have to attend in the Master's office on most inquiries and subsequent proceedings under the act, and it is deplorable to consider how many would thus suffer. Would it not be better to call in the aid of some extraordinary tribunal to deal with the cases likely to arise under this act, as was done with such success under the West India Slavery Compensation Act?

These observations are made in any but a hostile spirit to the bill. We think that a measure properly and effectually embodying and carrying out the principle of a judicial sale, good against all the world, and appointing a hand to receive the purchase-money, which money, for the purposes of all charges and incumbrances, shall still be treated as land, would be of incalculable use in the present state of Ireland. We believe there are at present hundreds, if not thousands, of persons expecting some such measure, the legal machinery of which they do not comprehend, but the practical effect of which is perfectly intelligible to them. Land with a secure title and a ready mode of transfer is not of mere transitory value: it is not in fashion this year, and out the next; the use of it is and must be of a permanent character. But in Ireland we are now slowly finding out that the title is so complicated, the mode of transfer so expensive and cumbrous, and all dealings with it so difficult and dangerous, that it is thereby greatly decreased in value, and the owner of the land is often next door to a beggar. The light is slowly breaking in, even upon the agricultural mind, that land may be so circumstanced as to be obtained by the few and not the many, and that this is its present condition: that instead of making

the most of a commodity of which the landowner is the sole possessor, he surrounds its acquisition by others with almost insurmountable difficulty, and that he the lord of many thousand acres, is thus unable to dispose of one. It is entirely then for the worthy owner to consider how long he will endure this state of things; how long he will put up with a system which has no single benefit to recommend it; which, although it is expensive and tedious, is not secure; which at once deprives him of the power of properly and usefully employing the land, and prevents its transmission to another. It has long been thought that these inconveniences were in some shape or other inseparable from the ownership of land: the question which now remains is, whether this notion be true or not.

ART. XII. — NEW COUNTY COURTS ACT,

9 & 10 VICT. c. 95. ROYAL ASSENT, 28th Aug. 1846.

NEXT to the military services which the great body of landed proprietors were liable to perform under the feudal system, the most remarkable feature of that institution was the almost invariable connection of judicial duties with the tenure of land. In our own country, the inferior lords were entitled to require the attendance of their freehold tenants, — whether holding by military or by non-military tenure, — in their courts-baron, for the purpose of administering justice in matters arising within the district to which the seigniority extended, while the king, the superior lord, summoned his great tenants holding immediately of the crown, *per baroniam*, to administer justice for the whole realm. The inferior courts-baron have been reduced to comparative insignificance by successive alterations in the nominal value of money, the extent of their jurisdiction having been from an early period limited to 40s. In the supreme court-baron, still greater

changes have taken place. The judicial duties attached to baronies by tenure are still substantially performed, the appellate jurisdiction being retained, although original jurisdiction has long fallen into desuetude, or rather it has been entrusted to other hands. These duties, however, are no longer performed in respect of actual tenure. The baronage of England holding *per baroniam* were gradually succeeded by persons who were barons only by estoppel — barons because they were so designated in the king's writ of summons.

Persons holding of the crown otherwise than *per baroniam* — a class which greatly increased upon the breaking up of the ancient baronies, and the alienation and dismemberment of the great serjeanties — performed the judicial duties incident to the character of tenants, by doing suit at courts convened by the king's representative in the county, and there satisfying the condition of their tenure by exercising judicial functions in respect of matters arising within the county. A court so held was called a county-court, *curia comitatūs*, not because it was held in and for the county, but because it was held before the *comitatus* — the freeholders of the county. The assembled freeholders, the *comitatus*, of Cornwall would constitute the county-court of Cornwall, when summoned to the castle of Wallingford to administer justice among the residents in Berkshire, as truly as if meeting at Bodmin to decide controversies arising in their own county.

The county-court, like the court-baron, had jurisdiction to the extent of 40s., an amount originally sufficient to reach the ordinary transactions of life. Besides which, a plaintiff might obtain from the crown a commission, in the form of a writ of justices, authorising the sheriff to direct his *comitatus* to take cognisance of debts and demands to any extent expressed in the writ. Notwithstanding this power of enlarging the jurisdiction, the county-court has fallen into disuse, except for the recovery of debts so small as not to be allowed to be sued for in the superior courts. For this various causes may be assigned — the introduction of the writ of *nisi prius*, the increased facility of communication with Westminster Hall, and above all, the absence of confidence in the judicial

qualities of the petty freeholders who usually attend and constitute the county-court.

With respect to the title of the valuable measure which forms the subject of the present article, it may be observed that there is some incongruity in the adoption of the style "county-court" as applied to courts from which the *comitatus*—the freeholders, the *judices nati*, the essential elements of the county-court—are sedulously excluded, in which they have neither voice nor place. The legislature seem to have forgotten the real nature of the county-court, and to have looked merely at the name, without reference to the origin or to the constitution of the court. Coincidence of sound alone appears to have been attended to in the adaptation of an old name to the courts intended to be created.

Referring to our former analysis of the Act¹, before it came into operation, we shall again notice those provisions which seem to be now worthy of attention.

The first and second sections arm the crown with a discretionary power as to the creation and alteration of the new judicial districts. These districts embrace the whole of England and Wales, with the exception of the city of London, with the peculiar tribunals of which it appears to have been deemed unsafe or inexpedient to interfere.

The third section provides that every court held under the act shall have all the jurisdiction and powers of the county-court. This provision appears, however, to be wholly nugatory, the act afterwards taking away that jurisdiction and those powers, and substituting others. By this section the new court is made a court of record, which the old county-court is not; but as the powers of the new court with respect to fine and imprisonment are defined by the Act, the only effect of this provision seems to be, that the written proceedings of the new courts are to be treated as incontrovertibly true, whereas the allegations contained in the proceedings of the old county-court may be submitted to the consideration of a jury. The singularity and importance

of this provision will be apparent, when it is considered that the written proceedings of all other courts of record, whether superior or inferior, with the exception of those of the House of Lords, are subject to revision, correction, and annulment upon a writ of error, from which the new courts are expressly exempted by s. 108.

By the 4th section, the jurisdiction of the old county-court is preserved; in respect of all matters not within the jurisdiction of the courts held under the Act; and it provides that all proceedings commenced in the county-court of any county before the holding of courts under the Act, may be continued in the same manner as if they had been commenced under the authority of the Act. Under this latter provision suits pending in the old county-court are transferred, *in statu quo*, into the new court, but must there be proceeded with in the summary mode introduced by the Act without regard to the state of the pleadings, &c.

By the 7th section the Small-Debts Act of the 8 & 9 Vict. c. 127., is to cease to operate with respect to matters coming within the provisions of the present Act.

The 7th section has occasioned much practical inconvenience: it provides that all proceedings in execution of certain local Small-Debts Acts, commenced before the new Act comes into operation, shall be executed and enforced against all persons liable thereto, in the same manner as if they had been commenced under the Act. No provision is here made for the case where the jurisdiction of the old court extends into several of the new districts created under the Act, nor is any machinery provided for continuing the proceedings of the suppressed courts even where the jurisdiction is, in point of locality, co-extensive.

The 9th section prescribes the qualification and regulates the appointment of the judges who are to preside in the new courts. The judge must be a barrister of seven years' standing, or who has practised as a barrister and special pleader for seven years, and is to be appointed by the Lord Chancellor. In case of a vacancy, a judge, similarly qualified, is (sect. 16.) to be appointed by the Lord Chancellor,

or, when the whole of the district is within the Duchy of Lancaster, by the Chancellor of the Duchy.

The 17th section prohibits any judge from practising as a barrister *within the district in which his court is held*.

By the 18th section, judges are removable for inability or misbehaviour. As no absolute discretionary power is here vested in the Lord Chancellor or the Chancellor of the Duchy, it would seem that a mandamus would lie to restore a party who was removed upon an unfounded allegation of inability or misbehaviour. The point may, however, be raised in an action for money had and received brought against the successor to recover the fees or salary.

Under the 19th section a judge may be removed from one district to another district, in which the salary is not less than in the former district.

The 20th section contains two provisions for the appointment of deputies. First, — In the case of illness, or unavoidable absence, a barrister of three years' standing, or an attorney not practising within the district, of ten years' standing, may be appointed by the judge, or, in the case of his inability to make such appointment, by the Lord Chancellor or the Chancellor of the Duchy, to hold any court under the Act. Secondly, — in order to allow the judge a vacation, — he is permitted, with the approval of the Lord Chancellor, to appoint a deputy, who must be one of the judges appointed under the Act, or a barrister who has practised for at least three years, to act for him for any time or times not exceeding two calendar months in any twelve months.

By the 22d section, judges and officers appointed under the Act, are to perform all such duties relating to matters in Chancery as the Lord Chancellor shall, by any general order, direct.

The 23d section directs the Lords of the Treasury to appoint *treasurers* of the new courts. The duties of the treasurer, though important to the convenient working of the courts, do not appear to require any special notice.

The 24th section directs, that in every court there shall

be a clerk, who must be an attorney, and who is to be appointed by the judge, subject to the approval of the Lord Chancellor, and who is authorised to appoint assistant clerks. Upon this section a doubt arose, whether a judge, appointed to a district in which several courts are to be held, was bound to appoint one clerk for the whole district, or might appoint a separate clerk for each court. It has been considered, that the latter is the true construction, and that view of the question has been extensively acted upon.

The 31st section provides for the creation of high bailiffs, whose functions are nearly the same as those performed by under-sheriffs in relation to the superior courts.

The 37th section directs the taking of fees, according to a table annexed to the Act. The table shows what fees the clerk is to receive, for the judge, for himself, and for the bailiff. But the judge and officers may be directed, by an order in council, to be paid by salaries instead of fees. (Sect. 19.) The salaries are not to exceed 1200*l.* a-year for a judge, and 600*l.* a-year for a clerk.

A general fund is to be raised for the purposes of the act, by a payment of five per cent. upon the sum sought to be recovered. (Sect. 52.) To this fund are to be paid all penalties, forfeitures, and fines recoverable under the Act, and suitors' money unclaimed for six years, and surplus fees, beyond the salaries of the judges and officers.

At each place at which the Queen has ordered that courts shall be held, a court is to be held once at least in every calendar month, or at such other intervals as a secretary of state may order. (Sect. 56.)

The process of the court is to be *under seal*, and it is made felony to forge the process of the court, or to use any forged process, or to act, or to profess to act, under any false colour or pretence of the process of the court. (Sect. 57.) It appears that the latter part of this section has already been violated by London tradesmen, who, not aware, perhaps, of the liability to transportation which they incur, seek to terrify their customers by serving sham process, and sham notices upon them.

The 58th section regulates the jurisdiction of the new courts. They are to have cognisance of all pleas of personal actions where the debt or damage claimed is not more than 20*l.*, whether on balance of account or otherwise, with the following exceptions:—1st. Actions of ejectment; 2dly, Actions in which the title to any hereditament, corporeal or incorporeal, or to any toll, fair, market, or franchise, shall be in question; 3dly, Actions in which the validity of any devise, bequest, or limitation under any will or settlement, may be disputed; or, 4thly, Actions for malicious prosecution, libel, slander, criminal conversation or seduction; or, 5thly, Actions for breach of promise of marriage. All these actions, except the first, are cognisable in the old county-court, which also retains its jurisdiction by justices in cases above 20*l.* in those forms of action which are now, in cases not exceeding 20*l.*, within the jurisdiction of the new courts. On the other hand, the new courts, under the words “all pleas in personal actions,” have cognisance of actions of account and of detinue of charters, which could not be brought in the old county-courts; and though actions of ejectment are expressly excluded, a remedy is given (sects. 122—127.) for the recovery, by the process of the new courts, of houses, lands, &c., where the yearly value or rent does not exceed 50*l.* upon the determination of the term or interest of the tenant. Where the debt or damage is above 20*l.*, a plaintiff is not allowed to divide his cause of action and bring separate suits (sect. 63.): but when a debt above 20*l.* is payable by instalments, the creditor may maintain an action, or several actions, in respect of instalments under 20*l.*: for though an action of debt will not lie for each instalment, an action of assumpsit will lie. And the Act, (sect. 63.) allows a party having a cause of action above 20*l.* to abandon the excess, and sue for that amount. A minor is allowed to sue for wages or for money due for piece-work, or for work as a servant, “in the same manner as if he were of full age,” (Sect. 64.)—that is, he may sue, in such cases, without the intervention of a *prochein amy* or guardian, which would be required in other courts. The jurisdiction is declared to extend (sect. 65.) to the recovery of any demand,

not exceeding 20*l.* which is the whole or part of the unliquidated balance of a partnership account, or the amount or part of the amount of a distributive share under an (undisputed) intestacy, or of any legacy under a will (not contested).

By sect. 68., one of several joint-debtors may be sued without joining his companions, and he may recover contribution against his co-debtors.

Suits are commenced by applying to the clerk to enter a plaint in his book; upon which plaint a summons is to issue. (Sect. 59.) The summons may issue in any district in which the defendant, or one of the defendants, dwells or carries on business at the time of action brought. Where the defendant has changed his place of abode or place of business, from A. to B., within six calendar months, the summons may issue into B., or, by leave of the court, it may issue into A., in which case the summons is to be served by a bailiff of A. (Sect. 61.)

The judge is to decide all matters of law and of fact, unless the amount sued for exceeds 5*l.*, and an application has been made for a jury, and 5*s.* has been deposited with the clerk of the court. (Sect. 71.)

No evidence is to be received which is tendered to prove a cause of action differing from that set out in the summons. (Sect. 75.)

Notice is to be given to the clerk of any special defences upon which the defendant means to rely. (Sect. 76.)

Suits may be settled by arbitration. (Sect. 77.)

If the plaintiff does not appear in court on the return of the summons, the cause is to be struck out. If the plaintiff appears, but does not make out his case, a nonsuit is to be awarded, or a judgment entered for the defendant. In either case, if the defendant appears, and does not admit the demand, the court may give him his costs. If the plaintiff does not appear, but the defendant, or some one authorised by him, does appear, and admits the debt, and pays the fees, the court may give judgment as it could have done if the plaintiff had also appeared. (Sect. 79.)

If the defendant does not appear, having been duly sum-

moned, the court may proceed *ex parte*, but may grant the defendant a new trial. (Sect. 80.)

At the hearing the parties and their wives may be examined as witnesses. (Sect. 83.) This is a most important provision, as it seldom happens, in these courts, that either the claim or the defence can be established without calling the parties or their wives. Not unfrequently, it is the wives only that appear.

In the absence of any special direction, the costs are to abide the event. (Sect. 88.)

Judgments, except upon nonsuit, are to be final; but the judge may in any case grant a new trial. (Sect. 89.)

No case is to be removed into a superior court unless the cause of action exceed 5*l.*, and unless it be made appear to a judge of a superior court that the case is fit to be tried in a superior court.

The 91st section is obscurely worded. The meaning of it seems to be this: that a party may *appear* by an attorney, or may appear by a barrister instructed by an attorney, or he may, by the leave of the court, appear by a non-professional agent; but that neither attorney, barrister, nor agent can *argue* a case without the leave of the judge; that non-professional agents are not to have or recover any costs; that no higher fee than 1*l.* 3*s.* 6*d.* is to be allowed as the fee of a barrister; an attorney, nothing, unless the demand amount to 40*s.*, and not more than 10*s.* unless the demand exceeds 5*l.*, nor more than 15*s.* in any case; and that fees of counsel and attorneys are not to be allowed on taxation, in the case of a plaintiff where less than 5*l.* is recovered, or in the case of a defendant, where less than 5*l.* is claimed, nor in any case except by order of the judge.

By the 92d section the judge is empowered to direct by what instalments the sums recovered shall be paid. This is a most beneficial provision, (taken from the courts of requests,) as in a majority of cases the debt is not disputed, and the only question is as to the means and the mode of payment. In default of payment execution issues against the goods. (ss. 94, 95.) And in the case of an unsatisfied judgment

the plaintiff may cause the defendant to be examined as to his property, and as to the manner and circumstances under which the debt, &c. was contracted, and as to the means of payment he then had, and as to the property he still has, and as to the disposal of property (s. 98.); and where credit has been obtained by false pretences, fraud, or breach of trust, or without reasonable expectation of being able to pay, or there has been any gift or transfer, or change, removal, or concealment of property, with a fraudulent intent, or the party, having means, refuses or neglects to pay, the party may, at the discretion of the judge, be committed to prison for any period not exceeding forty days. The same power of inquiry and commitment is given at the hearing of the cause, where the party appears or has been personally summoned. (Sect. 101.)

Power is given (sect. 113.) to take into custody any person insulting the judge, or any juror, bailiff, clerk, or officer; or interrupting the proceedings; or otherwise misbehaving in court; and the judge may commit the offender for any term not exceeding seven days, or impose a fine not exceeding 5*l.*, and commit for seven days unless the fine be sooner paid.

Provision is made for remedies against misconduct of officers (sect. 115, 116, 117.), and for adjudicating upon claims made to goods taken in execution (sect. 118.), and for replevying distresses taken for rent, or for damage done. (Sects. 119, 120, 121.)

By the 128th section, a concurrent jurisdiction is reserved to the superior courts, where the plaintiff dwells more than twenty miles from the defendant; or where the cause of action did not, in some material point, arise within the local jurisdiction; or where any officer of the court is a party, except in respect of any claim to goods taken in execution. In other cases, if an action be brought in a superior court for a cause of action for which a plaint might have been entered under the Act, and a verdict is found for less than 20*l.* upon contract, or for less than 5*l.* upon tort, the plaintiff is to recover no costs; and if the action fails, the defendant is to have costs as between attorney and client, unless the

judge who tries the cause, certifies that the action was fit to be brought in the superior court. It is observable, that while these restrictions are imposed upon suing in the *superior* courts, parties are not prohibited from suing in any *inferior* court of record. Actions therefore may be, and are still, brought in borough courts, &c. in respect of matters which are within the competency of the new courts created by the Act.

By sect. 78., power is given to certain judges of the superior courts to make general rules for regulating the practice and proceedings of the new courts, and to frame forms for proceedings, and for keeping books and accounts. In pursuance of this enactment rules have been framed, and forms of proceedings, prepared by five judges. As yet no difficulty appears to have arisen upon any of these rules, with the exception of the eleventh, which, if strictly construed, would render the Act, in most cases, inoperative. By that rule, where a summons to appear to a plaint is not served *personally*, and the defendant does not appear, it must be "proved to the satisfaction of the judge, that the service of the summons has come to the knowledge of the defendant ten clear days before the return day." The service, in the great majority of cases, is effected by delivering the summons to the wife, the husband being absent upon his daily employment. This service the judge accepts as evidence that the summons duly came to the knowledge of the defendant, where it appears that he is residing with his wife on the premises at which the service took place. So, in the superior courts, the service of a declaration in ejectment upon the wife of the tenant upon the premises is treated as equivalent to actual service upon the tenant himself. The necessity for the above rule is less than would have been the case, if it had not been provided by section 80., that the judge may set aside any judgment given in the absence of the defendant, and the execution (if any) thereupon, and grant a new trial of the cause, upon such terms as he may think fit.

From the expensive and dilatory machinery, and the unsatisfactory constitution of the old county-court, small debts may be considered as practically irrecoverable at common-

law. Various measures have been resorted to by the legislature for the purpose of facilitating the recovery of such demands in particular localities, the most usual being the establishment of courts of requests, in which justice was administered *à la moresque*¹ by the householders of the district. The present measure has been preceded by several abortive attempts to introduce a general system of local courts. It became law on the 28th of August, 1846, and came into operation on the 15th of March, 1847. Too little time has elapsed to enable us to make any statement drawn from actual results, sufficient to enable our readers to form an opinion as to the probable efficiency of the new law. During the few weeks that the experiment has been tried, it has, however, been shown that the practice of defrauding tradesmen, founded upon the impunity with which such frauds were accompanied, had become very general. It may be a subject of regret, that with respect to debts not exceeding 20*l*, it should have been found necessary to substitute an arbitrary judicial discretion for known and well-defined principles of jurisprudence. In a commercial community, however, this appears to be a less evil than the absence of any available remedy for the recovery of debts, small and unimportant when considered singly, but of great importance in their aggregate amount. The benefit of strictly legal and uniform decisions with respect to small claims, could not have been obtained without an extensive machinery, to defray the expense of which, the country would not be prepared until it had learnt to prefer the certainty of positive law to the uncertainty of judicial discretion. This possible inconvenience will, no doubt, be in a great measure obviated by confiding the summary jurisdiction given by the Act, to persons familiar, by previous habits and by actual practice, with the principles of the common law.

When the operation of the Act is better seen, we shall revert to the subject. In the meantime, we give the following results from one of the metropolitan districts.

¹ — “porque entre Moros,” says Maese Pedro’s assistant, “no hay traslado á la parte, ni á prueba y estése, como entre nosotros.” — *Don Quixote*, parte ii. cap. 26.

The court opened for the issuing process on the 22d of March. During the first month, ending on the 21st of April, 832 summonses were issued, of which 415 were for demands not exceeding 20s.; 185 for demands not exceeding 40s.; 157 for demands not exceeding 5l.; 46 for demands not exceeding 10l.; and 29 for demands exceeding 10l. The court sat for the hearing of causes on the 9th, the 10th, the 13th, the 16th, and the 20th of April, on which days all the cases (393) ready for trial, including those in which neither parties appeared at the return of the summons, were disposed of. No jury has been applied for. Cases in which a jury is to be summoned, and cases in which counsel or attorneys are employed, are to be taken on a separate day.

PROCEEDINGS OF THE SOCIETY

FOR

PROMOTING THE AMENDMENT OF THE LAW.

[Continued from 5 *Law Review*, p. 431.]

[Permission has been obtained to insert the Proceedings and a selection of the Reports of the Society for Promoting the Amendment of the Law, but the Society is not otherwise responsible for the contents of this Review.]

GENERAL MEETING, February 3. 1847.—The RIGHT HON. LORD BROUGHAM in the Chair.

The Minutes of the last Meeting (the 6th of January last) were read and confirmed. The following Members were ballotted for and elected: Philip Twells, Esq., Barrister, 1. New Square, Lincoln's Inn; Leonard L. Hartley, Esq., Middleton Lodge, Richmond, Yorkshire; Martin Tucker Smith, Esq., Banker, 13. Upper Belgrave Street; and Frederick Peel, Esq., Whitehall Gardens.

The Report of the Committee on Criminal Law on the following reference was presented: "To consider and report on the various plans which have been tried or proposed for the improvement of the treatment of Criminals, and young persons likely to become Criminals, and further to report on the principles on which punishments ought to be awarded and conducted." It was agreed that the Report should be further considered at the next Meeting.

The Report of the Committee on Equity on the following reference was presented: "To consider whether any and what improvement can be made in the present mode of proceeding in the Masters' Offices." It was agreed that the Report should be printed and considered at the next Meeting.

**GENERAL MEETING, Feb. 17. 1847.—Mr. COMMISSIONER
FONBLANQUE in the Chair.**

The Minutes of the last Meeting (the 3rd instant) were read and confirmed. Edward R. Boyle, Esq., Counsellor-at-law, of New York, was elected a Corresponding Member. The following Members were ballotted for and elected: The Right Hon. Andrew Rutherford, M. P., Lord Advocate, 49. Albemarle Street; the Hon. George Denman, 38. Portland Place; J. W. Willcock, Esq., Barrister, 6. Stone Buildings, Lincoln's Inn; Thomas Turner A'Beckett, Esq., Solicitor, 7. Golden Square; and T. D. Keighley, Esq., Solicitor, 73. Basinghall Street.

The Report of the Committee on Criminal Law on the following reference: "To consider and report on the various plans which have been tried or proposed for the improvement of the treatment of Criminals, and young persons likely to become Criminals, and further to report on the principles on which punishments ought to be awarded and conducted"—was ordered to be received.

The Report of the Committee on Equity on the following reference: "To consider whether any and what improvement can be made in the present mode of proceeding in the Masters' Offices"—was read and ordered to be taken into consideration at the next Meeting.

**GENERAL MEETING, March 3. 1847.—The RIGHT HON. THE EARL
OF DEVON in the Chair.**

The Minutes of the last Meeting (the 17th of Feb. last) were read and confirmed. The following Members were ballotted for and elected: George Mellish, Esq., Special Pleader, 3. Harcourt Buildings, Temple; James Kemplay, Esq., Special Pleader, 1. King's Bench Walk, Temple; J. H. Law, Esq., Barrister, 8. New Square, Lincoln's Inn; Chandos Wren Hoskins, Esq., Barrister; George Ridley, Esq., Barrister, 5. Pump Court, Temple; John Lee, Esq., LL.D., F.R.S., 5. College, Doctors' Commons; Hassard Hume Dodgson, Esq., Special Pleader, 7. King's Bench Walk, Temple; William Hawes, Esq., 17. Montague Place; and William Charles Wryghte, Esq., 4. Sambrook Court, Basinghall Street.

The Report of the Committee on Equity on the following reference: "To consider whether any and what improvement can be

made in the present mode of proceeding in the Masters' Offices," was considered; and, on the motion that the Report be received, the following Resolutions were made by way of amendment:—
"That much of the delay and expense which now arise in the progress of a suit in Chancery is to be traced to the present practice of bringing the suit in the first instance before a Judge, who refers either the whole or a part of the matters in dispute, or involved in the suit, to the Master to be inquired into, which matters the Master reports on, and these are again brought before the Court. That it deserves consideration, whether, in many suits, the whole of the matters in dispute between the parties, or involved in the suit, might not be disposed of by the Judge, sitting in Court or in Chambers, as might best suit the circumstances of the case. That it further deserves consideration, whether, in many cases, the whole matters in dispute between the parties, or involved in the suit, might not be satisfactorily disposed of by the Master without any reference to the Judge. That it further deserves consideration, whether the business of the Court of Chancery might not be distributed between the Judge and the Masters, in some mode better calculated to insure the more speedy and effectual administration of justice. That it further deserves consideration, whether the judicial duties, which are now discharged by the Masters, should be performed by an officer of the Court, subordinate in rank and of limited powers. That it further deserves consideration, whether a more effectual machinery for taking accounts, and for disposing of the administrative business of the Court, than now exists, might not be devised, and that, therefore, it is expedient that the present Resolutions be referred back to the Committee on Equity, with the view of extending their Report to them. That no satisfactory Report can be made on the present reference, without a proper consideration of these matters."

It was agreed that the further consideration of the whole subject should be adjourned till the next Meeting.

GENERAL MEETING, March 19. 1847.—The RIGHT HON. LORD BROUGHAM in the Chair.

The minutes of the last Meeting (the 3rd inst.) were read and confirmed. The following Members were ballotted for and elected: Robert Cole, Esq., Solicitor, 14. Tokenhouse Yard; and James Stephenson, Esq., Barrister, 61. Queen's Row, Walworth.

The reception of the Report of the Committee on Equity on the

following reference being moved: "To consider whether any and what improvements can be made in the present mode of proceeding in the Masters' Offices," the following resolutions were agreed to:—
 "That the Report be received. That the Committee be requested to direct their valuable labours to the consideration of whether any further alterations can be made in the whole system of the jurisdiction, practice, and constitution of the Masters and Masters' Offices, with a view to obtain a more speedy and cheap administration of justice in the Court of Chancery."

GENERAL MEETING, April 14. 1847.—Mr. COMMISSIONER FANE in the Chair.

The Minutes of the last Meeting (the 19th of March) were read and confirmed. The following Members were ballotted for and elected: Delabere R. Blain, Esq., Barrister, 24. Beaufoy Terrace, Kilburn; and Gilbert Abbott A'Beckett, Esq., Barrister, 3. Inner Temple Lane.

The Report of the Committee on the Law of Property on the following reference was presented: "To consider the propriety of making a General Map of the Lands of England and Wales, for the purposes of Registration and Conveyance, and otherwise, and to ascertain what steps have been taken, and what materials are forthcoming, for making such a Map." It was agreed that the Report should be printed, and further considered at the next Meeting.

SELECTION OF ADJUDGED POINTS

REPORTED SINCE 1ST FEBRUARY, 1847.

POINTS IN COMMON LAW, p. 185.

POINTS IN EQUITY, p. 194.

POINTS IN THE LAW OF PROPERTY, p. 207.

COURTS.	REPORTERS.
Lord Chancellor - - -	2 Phillips. Part 1.
L. C. of Ireland - - -	Beatty. Part 3.
Rolls Court - - -	8 Beavan. Part 3.
V. C. of England - - -	14 Simons. Part 3.
V. C. Wigram - - -	5 Hare. Part 2.
Queen's Bench - - -	6 Q. B. Rep. Part 5. 7 Q. B. Rep. Part 1.
Common Pleas - - -	2 C. B. Rep. Parts 3, 4.
Exchequer - - -	15 Mees. and W. Parts 2, 3.
Practice Cases - - -	3 Dowl. and Lowndes. Part 5.

I. POINTS IN COMMON LAW.

1. Auction—Puffer. 2. Partnership—Principal and Agent—Provisional Committee Men. 3. Evidence—Lord Denman's Act—Interested Witness.
4. Slander—Privileged Communication. 5. Registration of Deeds—Lithographed Memorials. 6. Arbitrator's Notes—Practice. 7. Contract—Condition Precedent. 8. Power of Attorney—Stamp. 9. Insolvency—Extent of Discharge. 10. Ship—Liability for collision—Construction of Statute.

1. THORNETT V. HAINES. 15 Mees. & W. 367.

Auction—Puffer.

THE law as to puffing at auctions seems to stand thus. Courts of law hold that the secret employment of even one puffer inva-

validates a sale; *Bexwell v. Christie*, Cowp. 395., *Howard v. Castle*, 6 T. R. 642., *Crowder v. Austin*, 3 Bing. 368. Courts of equity on the other hand, hold that the employment of *one* puffer, in order to protect the property from being sold at an undervalue, is not fraud, though not notified, and does not affect the validity of a sale. *Woodward v. Miller*, 2 Collyer, 279., *Smith v. Clarke*, 12 Ves. 477. But law and equity both agree in holding that the employment of more than one puffer vitiates a sale; *Howard v. Castle*, 6 T. R. 642., *Wheeler v. Collier*, 1 Moody & M. 123.; Sugd. V. & P. p. 17., 11th edition; and that where a sale is announced to be *without reserve*, the employment of even one puffer has the same effect; *Rex v. Marsh*, 3 You. & Jerv. 331.; *Meadows v. Tanner*, 5 Madd. 34. In the case before us an action was brought by the purchaser of an estate at an auction, to recover back the deposit on the ground of the invalidity of the sale, by reason of the vendor having employed a puffer to bid for him. The auctioneer, before the sale, announced that it was to be *without reserve*; and therefore, without regard to the different views taken by courts of law and equity regarding the employment of a puffer, the Court of Exchequer held the sale to be void, and sustained the verdict which had been given for the plaintiff.

2. REYNELL V. LEWIS. WYLD V. HOPKINS. 15-Mees. & W. 517.

Partnership — Principal and Agent — Provisional Committee Men.

The liability of provisional committee-men for the acts of their fellows, is now a subject of frequent consideration before the legal tribunals. But every case seems to rest upon its own peculiar ground or special circumstances; and no general or governing principle has yet been elicited, by which the risks and duties of members of such bodies can be accurately predicated. Upon the two cases before us a long and elaborate judgment was pronounced by the Court of Exchequer, and more advantage will be gained by exhibiting in the language of the Lord Chief Baron a few of the considerations which arise upon this class of cases, than by entering into the details of the proceedings of any particular companies or their provisional committees. Pollock, C. B. "In these cases of actions against provisional committee-men of railways, it often happens that the contract is made by a third person; and the point to be decided is, whether the third person was an agent for the defendant for the purpose of making it, and made the contract as such. The agency may be constituted by an express limited authority to make such a contract, or a large authority to

make all falling within the class or description to which it belongs, or a general authority to make any; or it may be proved by showing that such a relation existed between the parties as by law would create the authority, as for instance, that of partners, by which relation, when complete, one becomes by law the agent of the other for all purposes necessary for carrying on their particular partnership, whether general or special, or usually belonging to it; or the relation of husband and wife, in which the law, under certain circumstances, considers the husband to make his wife an agent. In all these cases, if the agent, in making the contract acts on that authority, the principal is bound by the contract, and the agent's contract is his contract, but not otherwise. This agency may be created by the immediate act of the party, that is, by really giving the authority to the agent, or representing to him that he is to have it, or by constituting that relation to which the law attaches agency; or it may be created by the representation of the defendant to the plaintiff that the party making the contract is the agent of the defendant, or that such relation exists as to constitute him such; and if the plaintiff really makes the contract on the faith of the defendant's representation, the defendant is bound; he is estopped from disputing the truth of it with respect to that contract; and the representation of an authority is *quoad hoc*, precisely the same as a real authority given by the defendant to the supposed agent, this representation may be made directly to the plaintiff, or made publicly, so that it may be inferred to have reached him, and may be made by words or conduct. Upon none of these propositions is there, we apprehend, the slightest doubt; and the proper decisions of all these questions depends upon the proper application of these principles to the facts of each case, and the jury are to apply the rule, with due assistance from the judge. There are few, if any, of these cases, in which it is contended that authority was directly given by the defendant to the party making the contract to make it for the defendant. Rarely has that circumstance been proved by direct testimony. In one case it was said, that it was to be inferred from a conversation, in which the defendant expressed his satisfaction that the expenses were moderate. That was evidence of the fact for the consideration of the jury, entitled to more or less weight, according to the other circumstances of the case. But it is contended, that the relation of co-provisional committee-men constituted an association of quasi co-partnership, in which one was agent for the other, for the purposes of all preliminary proceedings necessary to enable them to obtain an act; or that the fact of their being co-promoters of the scheme, coupled with the

fact that no money was supplied for the expenses of it, was evidence to go to a jury, that each authorised the other to contract for these purposes on his behalf and that of the other promoters. It was insisted, that where there was no other evidence than the mere fact of the defendant having already agreed to be a provisional committee-man, there was a sufficient case, or at least a case for the consideration of a jury, to prove an authority given by the defendant to every other committee-man to give the order out of which the contract arose, by himself or by the solicitor, or secretary, or an authority to such solicitor or secretary to give it on behalf of the committee. We think that no such consequence follows, as matter at law, from the mere fact of the defendant agreeing to be a provisional committee-man. Such an agreement amounts to no more than a promise that he would act with other persons appointed, or to be appointed for the purpose of carrying some particular scheme into effect. The term "committee" means, an individual, or a body, to which others have committed or delegated a particular duty, or who have taken on themselves to perform it, in the expectation of their act being confirmed by the body they profess to represent or act for; an agreement to become one of the committee-men is an agreement to become one of that body. The schemes may be various, — to establish an hospital, or place of emigration, to which persons are to subscribe, merely for charitable motives, or partly from these motives, partly from others; or a proprietary school, or literary institution, or assembly room, in which they are to be beneficially interested as shareholders, or to obtain an act for a bridge, drainage, railway, or canal, — but whatever the object may be, it seems to us to make little or no difference in the position of the person agreeing to act as a committee-man. If the object of some, most or all, is gain to themselves individually, the legal consequence is the same as if the object of the parties were the most charitable and benevolent, though the result may be practically very different in exciting an improper prejudice in the minds of a jury when the evidence is laid before them for their consideration. Such an intended association constitutes no agreement to share in profit or loss, which is the characteristic of a partnership. It would be absurd to suppose that such a relation could be meant to be created by any of those who consented to act. Could it be imagined that a person would agree to be a partner not only with those who were then named committee-men, but any that should afterwards be named by themselves or by the projectors of the company; and could those who subsequently agreed to become members, suppose that those previously named could ever have so intended? The

truth is, the agreement to become a provisional committee-man means neither more nor less than what the words express,—namely, an agreement to act on the provisional committee, in carrying into effect the preliminary arrangements for petitioning parliament for a bill, and so to promote the scheme. If afterwards the provisional committee-man does act, he is responsible for his acts. But there are other cases in which the question does not assume so simple a form, and where there is evidence that the defendant has not only consented to be a provisional committee-man, but has authorised his name to be inserted in a prospectus not generally, but a particular prospectus in which in some cases certain persons are described as the acting committee, in others solicitors are named, or engineers, or a secretary. If such prospectus has been so publicly circulated, with the defendant's consent, that the jury would presume that plaintiff knew of it, or if the plaintiff has had it shown to him at or before the time of making the contract, and has in either case acted upon it in making the contract, the question is, what inference ought a reasonable man to draw from the contents of that paper? This must, of course, depend upon the terms of each particular prospectus. If the prospectus state merely the names of the provisional committee and nothing more, and no light be derived from the context, that circumstance does not alter the liability of the defendant. If not responsible as being one of the committee, in fact, he cannot become so by the representation of the fact. If it states the names of the acting committee also, where that has been appointed, is the meaning that the acting committee is to take the whole management to the exclusion of the provisional committee, their provisional character having ceased, in which case the provisional committee would not be liable; or does it mean that the provisional committee-men have appointed the acting committee, or the majority of it, on their behalf and as their agents, in which case they would be liable for the contracts of the acting committee, or the majority, made as such agents? Again, does it mean, where the solicitor's name is mentioned, that such person shall be regularly employed in that character by those of the committee who acted, or that he was already appointed by all whose names are mentioned, as their solicitor, to do all solicitor's business on their behalf? And then would arise a further question, what was the business, at the time of the contract, usually contracted by solicitors for companies intending to obtain an act of parliament, and on behalf of the company? which is a question of fact to be proved by evidence. The same remark applies to the appointment of secretary."

3. HEARNE v. TURNER. 2 C. B. Rep. 535.

Evidence — Lord Denman's Act — Interested Witness.

Lord Denman's Act (6 & 7 Vict. c. 85.) abolished all objections to the admissibility of witnesses, subject only to the following proviso: "That this act shall not render competent any party to any suit, action, or proceeding, individually named in the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person *in whose immediate and individual behalf any action may be brought or defended*, either wholly, or in part," &c. The struggle, therefore, now is, to bring an objectionable witness within the exceptions in Lord Denman's Act: and the present case is an example of this kind. Smith and Co. had fraudulently obtained from one Mytton two promissory notes, which found their way into the possession of the plaintiff. The defendant Turner, as Mytton's agent, and with his authority, took the notes out of the possession of the plaintiff, and so alleged, on being brought before a police magistrate upon a charge of feloniously obtaining them. Trover having been brought for the notes, Turner pleaded that Smith and Co. became fraudulently possessed of the notes, and had wrongfully delivered them to Hearne, the plaintiff: and in support of this plea Turner called Mytton, his principal, as a witness. Mytton stated, on the *voir dire*, that he had not, nor had any one on his behalf, indemnified Turner; that he expected, but did not know that he should, be relieved from payment of the notes if the action succeeded; and that he had nothing whatever to do with the action. The plaintiff objected to Mytton's admissibility on the ground that he had a direct interest in the event of the suit, but Mr. Justice Erle held the witness to be rendered competent by Lord Denman's Act, and received his evidence. The reception of this evidence was afterwards held, by the whole Court of Common Pleas, to be correct. The Lord C. J. Tindal held, that Mytton was an admissible witness at common law, and that it was unnecessary to rely on Lord Denman's Act. Maule, J. "The question of admissibility or non-admissibility of a witness is often one of considerable nicety and difficulty. The object of Lord Denman's Act was partly to remove objections, and partly to obviate those doubts and difficulties. I am not very willing to enter into the discussion as to the admissibility of this witness at common law. I think he was admissible. . . . But I will not further discuss that question. It is properly conceded that the statute 6 & 7 Vict.

c. 85. is an answer to the objection, unless Mytton comes within the description of a party on whose immediate behalf the action was defended. So far as regards his defence to this action, the defendant Turner would have been in precisely the same situation if Mytton had been dead: the record, therefore, does not show that Mytton was a person on whose immediate behalf the action was defended. It might, however, have been shown on the evidence. If, on the *voir dire*, Mytton had said, 'I directed Turner to obtain possession of the notes for me, and agreed to indemnify him against the consequences of any action that might be brought against him for so doing,' then he would have been the person on whose immediate behalf the action was defended. It appeared, however, that Mytton had nothing whatever to do with the defence. He is therefore clearly not within the exception of the late statute; and if so, it is conceded, and indeed it could not be denied, that, assuming him to have been incompetent at common law, he would be rendered competent by that act." *Creswell, J.* "Without meaning to express the slightest doubt as to the propriety of the opinion expressed by my lord and by my brother Maule, that Mytton was an admissible witness at common law, I think it sufficient to say, that Lord Denman's Act entirely removes all pretence for the rejection of his evidence."

4. GRIFFITHS v. LEWIS. 7 Q. B. 61.

Slander—Privileged Communication.

The defendant in this case endeavoured to protect himself by proving the slander to be a privileged communication. The plaintiff inquired of the defendant if he had accused her of using false weights in her business as a butcher. The defendant, in the presence of a third person, answered, "To be sure I did: *and you have done it for years.*" The defendant contended that his answer was privileged by reason of the plaintiff's previous inquiry. But the defence was overruled at the trial: and the jury having found for the plaintiff, the Court of Queen's Bench refused to disturb the verdict. *Lord Denman, C. J.* "It has been the constant course of persons complaining of slander to ask the author whether he abides by the imputation: it has been considered unsafe to bring an action without doing so. No case goes the length of laying down that repetition of a calumny in answer to such a question is privileged." *Patteson J.* "I grant that if the defendant had merely acknowledged a statement made by him formerly, that would not have sustained an action, except as evidence of a former statement: but

it is different when he goes on to say, 'you have done it for years.' Therefore I think there was no privilege in this case."

5. *REGINA v. REGISTERS OF MIDDLESEX.* 7 Q. B. 156.

Registration of Deeds — Lithographed Memorials.

One Hickson had granted several rent-charges of 40s. issuing out of his freehold property in Middlesex; and in order to insure accuracy and save time and expense, he caused the memorials for registration to be lithographed on parchment with proper stamps. The clerk at the register office refused to receive the memorials, because they were not in writing, and it was shown that it had been the invariable practice to refuse all memorials which were printed or lithographed. A mandamus to the registers was thereupon moved for. Lord Denman, C. J. "We all think that the registration ought to be allowed."

6. *DOE v. PRESTON.* 3 Dowl. & Lowndes, 768.

Arbitrator's Notes — Practice.

On an application to set aside an award made by a barrister, a verified copy of the arbitrator's notes was used by counsel in showing cause. This was objected to as an inconvenient and novel practice, which substantially, if not in terms, infringed the general rule established by the Bar, that an arbitrator shall not be called upon to make affidavit of what had taken place before him. Coleridge, J. "The rule laid down by the Bar is a very proper one, and it would certainly be infringing on it if such notes were to be received."

7. *KINGDOM v. COX.* 2 C. B. Rep. 661. †

Contract — Condition Precedent.

† Cox entered into a written contract with the plaintiff to supply him with a quantity of cast-iron girders of the various sizes indicated by drawings to be produced by the plaintiff's architect, and to deliver the girders perfect at the prices specified, and to use the defendant's best endeavours to deliver fifty tons of the girders on or before the 31st of January 1845, fifty tons more on or before the 28th of February 1845, and fifty tons more on or before the 31st of March 1845, *provided* the drawings for the first fifty tons were sent to the defendant within a specified time, and the drawings

for the remainder within a more extended time. In an action for breach of contract, by non-delivery of the girders within a *reasonable time*, the defendant pleaded that the plaintiff did not provide or deliver the drawings within the time agreed upon. But the Court held the plea bad on the ground that the delivery of the drawings within the specified times, was not a condition precedent to the plaintiff's right to complain of the non-delivery of the girders within a *reasonable time*.

8. WALKER v. REMMETT. 2 C. B. Rep. 850.

Power of Attorney — Stamp.

The question in this cause related merely to the sufficiency of the stamp on the following document:—"I do hereby authorise you to indorse or cause to be indorsed, my name to three several bills of exchange now in your possession (naming them), and which indorsements I do hereby undertake shall be binding on me: and I do further undertake to pay you the amount of the several bills as they respectively become due, should they not be duly honoured when mature." This instrument was stamped with a 2s. 6d. agreement stamp. The Court of Common Pleas held it to be either a "letter or power of attorney," or a "deed or other instrument of procuration," and in either case requiring a 30s. stamp within the General Stamp Act, 55 Geo. 3. c. 184. *Sched. Part I.*

9. LEONARD v. BAKER. 15 Mees. & W. 202.

Insolvency — Extent of Discharge.

An action having been brought against an insolvent at the Bristol assizes, upon two promissory notes, the defendant pleaded his discharge under the stat. 1 & 2 Vict. c. 110., and averred that the plaintiff was one of the creditors named in the defendant's schedule, filed in the Insolvent Court. It appeared that the plaintiff was mentioned in the schedule as a creditor for two sums of money not corresponding in amount with the sums mentioned in the notes: but the schedule made no mention of the notes. Thereupon Mr. Justice Erle directed a verdict for the plaintiff: and the Court of Exchequer held that the jury had been rightly directed. Parke, B. "The question turns upon the 75th section of the statute, the meaning of which, according to its ordinary grammatical interpretation, certainly is, that the insolvent is discharged as to those debts or sums of money *only*, which are specified in his schedule."

10. **BROWN v. WILKINSON.** 15 Mees. & W. 391.*Ship — Liability for Collision — Construction.*

In November, 1844, the brig *Epirus*, on her way to Sunderland in ballast, between Harwich and Orfordness, was so negligently navigated, that she struck the City of London steamer on her larboard bow, and occasioned damage to the amount of 500*l.* and upwards. By the statute 53 Geo. 3. c. 159., it is enacted that no owner of a ship shall be liable for damage arising from acts done without his default or privity to any other ship, further than the value of his own ship, and the growing freight *at the time of* the happening of such damage. In the present case the *Epirus* was so much injured by the collision that she sunk directly, and was wholly lost. She was also uninsured: and in an action on the case against her owners for the damage, they contended that their liability extended only to the value of the ship, and that as she was lost at the moment of the accident, and before the completion of the voyage, they were liable to nominal damages only. But the Court of Exchequer unanimously held that the value contemplated by the statute meant the value of the defendant's ship *immediately before* the collision.

II. POINTS IN EQUITY.

1. Counsel and Client — Security for Fees. 2. Specific Performance — Misdescription. 3. Equitable Waste — Acquiescence — Statute of Limitations.
4. Forgery — Stock — Bank of England — Jurisdiction. 5. Trustee Act — Jurisdiction of Master. 6. Appointment of new Trustees — Loss of Trust Property. 7. Mortgage — Redemption Demurrer. 8. Voluntary Conveyance — Equitable Mortgage. 9. Wife's reversionary Interest — Probate Duty. 10. Executors — Beneficial Interest in Residue — Parol Evidence.
11. Court Rolls — Evidence. 12, 13. Solicitor — Costs — Ineffectual Conveyance — Sale by Auction — Retraction of Biddings. 14. Creditor's Suit — Practice. 15. Trust — Precatory Words.

1. **LESLIE v. VERSCHOYLE.** Beatty, 535.*Counsel and Client — Security for Fees.*

Though the present is not a new case, it having been decided in 1815, its recent publication in the present year, and its relation to professional conduct, render some notice of it desirable. A bar-

rister made a claim against a testator's estate by virtue of a bond for 1000*l.*, which the testator had given him in consideration of the great benefit received from his past advice, and in consideration of his former professional advice to be thereafter given to the testator. The bond was accompanied by a warrant of attorney, under which judgment was entered up, and the obligor acquiesced in the transaction to the day of his death. It was not sought to place the bond higher than a voluntary bond. No creditors disputed the claim, and the only opposition was made by volunteers. On the authority of Maund's case, 7 Co. 112., where it was held, that an annuity, *pro consilio impenso et impendendo* was valid, Lord Chancellor Manners reluctantly made a decree for payment of the bond, as a voluntary bond, with interest. His Lordship expressed his regret that any such practice should prevail in the profession, and declared such dealings with a client to be most injurious to the character of a barrister, and left it to the honour and right feeling of the Bar to prevent the recurrence of such a case.

2. LORD BROOKE V. ROUNTHWAITE. 5 Hare, 298.

Specific Performance — Misdescription.

"Tollendum est ex rebus contrahendis omne mendacium."—*Cic. Off.* III. 15.

A timber estate belonging to the late Lord Monson, and by him devised in trust for sale, was bought by the defendant at an auction where the particulars of sale described the property as "Ingleby Wood, containing upwards of sixty acres of fine oak timber trees, the average size of which approaches 50 feet." Among the lots, the wood was also described as containing sixty-five acres of growing timber. The defendant, who was a timber merchant, resisted the completion of his contract on the ground, which was fully supported by evidence, that the average size of the trees was about twenty-two feet; though the plaintiff's evidence went to show that thirty-five feet was the average size. A bill for specific performance having been filed, the defendant showed that the sale took place at a time when he had no means of seeing the wood, and that he relied on the description given in the particulars of sale, and on the recommendation of one J. West, who had no sufficient means of judging of the size of the timber. He was willing also to complete his purchase upon having compensation made or allowed for the deficiency in the size and value of the wood; but if the compensation could not be measured by the Court, then he contended for the abrogation of the contract, as the subject matter proved to be so different from that which he

had been led to expect. The Court, having no means of estimating the compensation, dismissed the bill. *V. C. Wigram*. "An indefinite representation by a vendor ought to put a purchaser upon inquiry: but a definite representation, upon a point affecting the value of the subject of sale will entitle the purchaser, if the representation be untrue, to resist the specific performance of the contract. Now the sale in this case took place at a time of the year when the wood could not be viewed. I think, therefore, the representation made must, as against the vendor, be taken as a definite representation that the vendor knew the timber in the wood approached an average size of fifty feet. . . . Was the defendant, who is stated to be a timber merchant, deceived by this representation? When I say that a vendor, who makes a representation that is untrue, cannot enforce his contract, that, of course supposes that the purchaser is deceived: if the purchaser knows at the time that the representation is untrue, he is not deceived, and cannot avail himself of the fact that there has been misrepresentation." (His Honour then intimated a doubt, founded on the defendant's answer, whether the defendant had in fact been deceived, and thus proceeded,) "If this were so, it was the plaintiff's duty to have made out that case, which he has not done. As it is, there has been a representation, which turns out not to be correct; and I think the proper course will be to dismiss the bill, but without costs."

3. *DUKE OF LEEDS V. EARL OF AMHERST.* 2 Phill. 117.

Equitable Waste — Acquiescence — Statute of Limitations.

The estate of Kiveton was settled upon the late duke of Leeds for life without improvement of waste, with remainder to his first and other sons in tail male, with divers remainders over. In 1808, when the present duke, who was the eldest son, was only nine years of age, the late duke pulled down the ancient family mansion-house of Kiveton, and cut a large quantity of ornamental timber in the park. In 1838 the late duke died, whereupon his eldest son, the present duke, became tenant in tail of the estate, and brought his suit against his father's executors for reimbursement in respect of the waste thus committed. The Vice Chancellor of England made a decree in his favour. On appeal the defence was, that the proceedings of the late duke had been judicious — that there had been long acquiescence — and that the Statute of Limitations had run against the claim. The Lord Chancellor (Cottenham) held it to be quite immaterial whether the acts in question were judicious or not, as a tenant for life has no right,

whatever may be his opinion upon that point, to alter the nature of the property belonging to another person : and upon the point of acquiescence his Lordship decided that such a term was wholly inappropriate, as the present duke was a minor at the time of the waste, and that nothing less than a release or express abandonment of the plaintiff's rights could, under the circumstances, be a bar to the suit. Upon the statutory bar an extract from his Lordship's judgment will be desirable. Lord Cottenham, C. "The answer to the argument as to time is, that the property did not fall into possession until the year 1838, when the tenant for life, who committed the waste, died. Until that time the plaintiff's right was a mere contingency : if he had died before his father, it was gone : and it was only on the death of his father that he became absolutely entitled as tenant in tail to the proceeds of that part of the estate which had been improperly converted into money by the tenant for life. I in vain asked for authority to show that, under the circumstances, a party, whose estate becomes vested in possession upon the death of the tenant for life, is to be barred of his equity if the tenant for life lives twenty years after the time when he committed the waste. No such case was produced — none certainly exists. The rule of law is quite the other way. The 2d, 3d, 4th, and 5th sections of the statute 3 & 4 W. 4. c. 27. all apply more or less to the subject, and they all give to the tenant in tail his remedy from the time at which his estate vests in possession. Indeed, whether this case be considered as within the statute, or whether it is to be governed by the rule that equity follows the law, it would be strange, if where an act of forfeiture has been committed by the tenant for life, the tenant in tail is not bound to enter for the forfeiture, but may have twenty years from the time when his own estate vests in possession, and yet the moment you convert a legal right into an equitable right, that is to say, the moment you divert part of the estate from its proper purpose by an act of equitable waste, the tenant in tail should be barred by the lapse of twenty years from the time when the waste was committed. If equity is to follow the law, this court is bound to adopt the rule which the statute has laid down, and to allow the same time for making a claim of this kind which the statute gives for making a claim to the land itself. The appeal must be dismissed with costs."

4. *SLOMAN v. BANK OF ENGLAND.* 14 Sim. 475.

Forgery — Stock — Jurisdiction.

The facts of this case are very few ; but we make a large extract

from the judgment, in order to exhibit in a practical point of view the grounds and principles of the relation subsisting between the public and the Bank of England as the manager of the parliamentary funds. In 1827, Hillman and Picard became co-trustees of 6250*l.* 4 per cents. in trust for the plaintiff and others. The stock stood for many years in the joint names of Hillman and Picard. In 1839 Picard forged Hillman's name to a power of attorney, and sold out the stock. In 1841 Sloman discovered the forgery; but Picard escaped from England before any proceedings were taken for his apprehension. The Bank refused to replace the stock on the ground that the *cestui que* trust had favoured Picard's escape; and on a bill being filed by Sloman and the other *cestui que* trust, the Bank relied on that objection, and finally objected that a suit for the replacement of the stock could not be maintained by the *cestui que* trust, as no privity subsisted between them and the Bank. The Bank also contended that Picard as a joint tenant of the stock, had a right to transfer a moiety, and that the liability of the Bank therefore extended only to the other moiety. The Vice Chancellor of England. "I have not the slightest doubt with respect to the situation in which the Bank stands. The liability of the Bank is constituted by the act of the 11th Geo. 4. and 1 Will. 4. c. 13., by which the four per cents. were converted into three and a half per cents. First of all, certain enactments were made, which had the effect of giving an option to the different proprietors of the four per cents. either to accept the same amount of stock in the three and a half per cents., or to be paid off. The act then provided that the dividends of the newly created stock should be payable at the Bank of England, and that the sums for the payment of them should be issued and paid out of the Consolidated Fund. I notice that with reference only to that singular ground on which the Court of King's Bench rested their judgment in the case of *Davis v. The Bank of England* (5 Barn. & Cres. 185.), when it was heard in error,—namely, that, inasmuch as the declaration did not allege that the requisite funds for payment of the dividends had been supplied to the Bank by the Government, there was no liability on the part of the Bank. Now, it seems to me that every court of law ought to take it for granted that that which the Legislature says shall be done, has been done; but, however, the Court of Error was satisfied to get rid of any difficulty in that case by making that objection. The 10th section of the act provides that books shall be kept by the Bank, in which the names of the proprietors of the new stock shall appear. Then the 13th section, as I understand it, has made it the duty of the governor and company of the Bank of Eng-

land to keep an account in books to be provided for that purpose, which shall show every transfer and assignment which is made by parties appearing to be entrusted in the stock in question. They are made, if I may use the expression, the parliamentary book-keepers of this fund; and it is a duty which they owe to all the persons who may be interested in the fund, so to keep the account as that it may distinctly appear, at all times, what transfers and assignments have been made. And my opinion is, that if at any time there had been stock standing in the name of A., and afterwards that stock did not appear (no matter from what cause) to be standing in his name, A. would, *primâ facie*, have a right to say, 'Let the account stand as it did on a given day.' If it can be shown that A. himself has transferred the stock, that is an answer; but the Bank account ought to be kept, with regard to every individual who ever appeared as a stock-proprietor, in such a manner as to show what the account really is. If that be so, it follows, as a matter of course, that relief may be had in equity; because the plaintiff in equity has to allege, against the Bank, 'You are bound by law to be my book-keeper in respect of my stock, and to show me the true account of it; and if I can show that upon a given day stock stood in my name, and now show that it does not stand in my name, and I had not authorised the transfer of it, you are responsible to me—that is to say, you must make the account stand as it ought to have stood.' This appears to me to be the true view of the case: and, according to that view, there would be a direct right in every person who was interested in the stock in question to file a bill against the Bank of England, to have any error occasioned by the Bank corrected. It is observable that an action gives a remedy circuitously only, because all that can be recovered by an action is a certain sum of money, which may or may not be sufficient to buy a fund to replace the stock; and it seems to me that the true view of the case is that which I have taken, and which is formed from the provisions of the act of parliament. And I further think that the view which I have taken is a complete answer to the argument that, where the account stands in the names of two, they are joint tenants, and each of them may transfer a moiety of the fund. The unsoundness of that argument is apparent from this, that, if it be the right of the joint tenant to transfer a moiety of the fund, he may (supposing the amount of it to be 1000*l.*) first transfer 500*l.* Then 500*l.* will remain in the names of himself and his co-tenant; and he may transfer a moiety of that 500*l.*; and so he may go on transferring moiety after moiety until the remainder will be less than any assignable quantity. Virtually he will have the power to transfer

the whole ; and that will be the result of the doctrine that a joint tenant of a fund has a right to transfer a moiety of it. In my opinion, however, it is apparent, from the plain language of the act of parliament, that the transfers were to be made by the parties in whose names the stock which was to be made the subject of transfer, stood And the Bank having authorised a transfer which they ought not to have sanctioned, are themselves now liable, in a court of equity, to restore to the parties complainant the stock as it stood immediately before the transfer. It has been urged by way of defence in this case, that the plaintiffs have lost their right by some supposed subsequent misconduct : whereas their right to have the stock replaced did exist at the very moment when the stock was parted with improperly. How their subsequent conduct two or three years afterwards . . . can affect their civil right, is to me a mystery The defence totally fails ; and as the equity is clear there must be a decree that the Bank do forthwith replace the stock in the name of Hillman, and pay him the amount of the dividends from the 5th of January, 1841 . . . The costs of the suit and the cross-bill must be paid by the Bank."

5. FOWLER V. WARD. 8 Beav. 488.

Trustee Act — Jurisdiction of Master.

Under the act 1 W. 4. c. 60. a reference had been directed to the master to *appoint* a proper person to execute a conveyance for an infant, who had been found to be a trustee within the meaning of the act. The Master having settled the conveyance, certified that he had appointed William Ford to execute it on behalf of the infant. The purchaser objected that the act empowered the Court of Chancery to appoint, and that the power so conferred could not be delegated to the Master : and of that opinion was Lord Langdale, M.R. The reference should have required the Master to *approve* of a proper person, and upon that approval, it was the province of the Court to appoint. His Lordship therefore appointed the same party whom the Master had selected to execute the conveyance for the infant.

6. BENNETT V. BURGIS. 5 Hare, 295.

Appointment of new Trustees — Loss of Trust Property.

During the early years of the administration of the trust for the more effectual execution of which this suit was instituted,

a legacy of 500*l.*, part of the trust property, had been lost by misapplication on the part of the original trustees. The bill prayed that new trustees might be appointed of the trust funds *other than* the 500*l.* which had been so misapplied, and not of the entire funds properly subject to the trusts in question; and it was argued that this was the proper course: for that if the settlement to be executed by the new trustees were to comprise the legacy, those trustees would not be absolved in respect of that fund. But Vice Chancellor Wigram said it would be improper to appoint trustees of a part of the trust property, omitting the remainder. His Honour added, that he knew of no precedent for such a course; and that the effect of it might be to discharge parties who were answerable for the breach of trust from their liability, or at least to interpose difficulties in the way of the *cestui que* trust in recovering the trust fund which had been misapplied. The new trustees might be protected by the order of the Court, without omitting any portion of the trust property.

7. BROWN v. COLE. 14 Sim. 427.

Mortgage — Redemption — Demurrer.

It has long been settled that a mortgagor cannot anticipate the redemption day applied by the mortgage-deed unless with the consent of the mortgagee.¹ An attempt, however, was made in this case to break through the rule in question. The mortgage was made on the 1st of April, 1844, with a proviso for redemption upon payment of the mortgage money on the 1st of April, 1845, with interest in the meantime by quarterly payments. Soon after the execution of the deed, the mortgagor, having an opportunity of selling the estate to advantage, tendered to the mortgagee the mortgage money, and the interest up to the 1st of April, 1845, together with a deed of reconveyance for his execution. The mortgagee refused to take the money or to execute the conveyance; whereupon the mortgagor filed a bill for redemption, to which the mortgagee demurred. The Vice Chancellor of England sustained the demurrer, on the established ground that no right of redemption existed before the day appointed for that purpose in the mortgage-deed.

¹ "It is said to be a maxim, that none can come to redeem a mortgage when the mortgagee cannot compel the payment of the mortgage money; for the remedy ought to be *reciprocal*." — 1 Pow. Mortg. 335 *a. ed.* 1826.

8. *LISTER v. TURNER.* 5 Hare, 281.*Voluntary Conveyance — Equitable Mortgagee.*

In June 1841, several freehold houses at Liverpool, belonging to William Slater, were voluntarily settled by him upon the trusts declared by a contemporaneous deed for the benefit of himself and his wife. In July of the same year he deposited with the Union Bank of Liverpool the title deeds of the settled property, accompanied by a memorandum which stated the deposit to be made as a security for the general balance of his account with the Bank. The memorandum also contained an undertaking to execute a formal mortgage with a power of sale, when thereto required. In February 1842, Slater became bankrupt. His account at the Bank then showed a balance against him of 944*l*. The Bank thereupon filed a bill to set aside the settlement. The bill alleged the Bank to be a purchaser for valuable consideration under the stat. 27 Eliz. c. 4., intituled an Act against covinous and fraudulent conveyances, and therefore insisted that the voluntary settlement was void as against the Bank, and prayed a sale of the property. Vice Chancellor Wigram. "As to the point that the deeds of June 1841 are void under the stat. 27 Eliz., it seems to me that the case of *Buckle v. Mitchell*¹ is a direct authority for the proposition, that an equitable interest in land entitles a purchaser by contract, to clothe it with the legal title. By that case I consider myself bound; and that will entitle the plaintiff to avoid the deeds of June 1841, and to enforce his security. . . . The next question is, as to the form of the remedy to which the plaintiff is entitled,—whether the decree is to give the plaintiff the benefit of a legal mortgage, or to direct a sale. The decisions with regard to the rights of an equitable mortgagee are not uniform²; but in this case the express terms of the contract are, that Slater shall convey the premises by way of legal mortgage, and that such mortgage shall contain a full and absolute power of sale, and to make the suit available for its objects, it is necessary that there should be a decree for sale."

¹ 18 Ves. 100.

² See *Parker v. Housefield*, 2 Myl. & K. 419.; *Price v. Carver*, 3 Myl. & Cr. 157.; *Meller v. Woods*, 1 Keen, 16.; *Brooklehurst v. Jessop*, 7 Sim. 439.

9. ATTORNEY GENERAL V. MALKIN. 2 Phill. 64.

Wife's reversionary Interest — Probate Duty.

Thomas Brand bequeathed 12,000*l.* in trust for his wife for life, with remainder to Carr and his wife for their joint lives and the life of the survivor, with remainder to such persons as Mrs. Carr should by will appoint; and in default of appointment, "to and for the benefit of her executors or administrators." Upon this last limitation the question in the cause arose. Mrs. Carr died without exercising the power, and her husband afterwards died without taking out administration to her estate. By his will he bequeathed all his property to his daughter Mrs. Malkin. Then Mrs. Brand, the first tenant for life, died: and upon her decease, Mrs. Malkin claimed the fund, either as her mother's sole next of kin, or by special designation as her administratrix, so as to entitle the Crown to probate duty only on the letters of administration to Mrs. Carr. But the Crown contended that the reversionary interest taken by Mrs. Carr under the limitation to her executors or administrators was part of her personal estate, and passed to her husband, and that Mrs. Malkin's title to it was derived under the will of her father, and that therefore probate duty and legacy duty were twice payable upon the fund; first, upon letters of administration to Mrs. Carr, and, secondly, upon probate of Mr. Carr's will. Lord Cottenham, C. "The question is whether these funds were part of the estate of Mr. Carr, that is, whether they were part of the estate of Mrs. Carr: for although they were a reversionary interest which never could fall into possession during the coverture, yet as the husband survived, he became entitled to such reversionary interest if it formed part of his wife's estate. Does, then, a gift to the executors or administrators of one of several tenants for life of a fund constitute part of the estate of such tenant for life, or is it a gift in trust for the next of kin of such person. It seems strange that this should be made a question . . . I am of opinion that the husband became entitled to this reversionary interest *jure mariti*, and that the probate and legacy duties are payable upon it as part of his estate." Judgment for the Crown for double probate duty and double legacy duty.

10. LOVE v. GAZE. 8 Beav. 472.

Executors — Beneficial Interest in Residue — Evidence.

It will be remembered that previously to the Act 1 Wm. 4. c. 40., executors were deemed to be beneficially entitled to the residue of their testator's personal estate, unless the testator's intention to the contrary appeared, and personal evidence was admissible on the part of the executors to rebut any presumption which might arise in opposition to the presumption of law in their favour. The act 1 Wm. 4., however, destroyed this presumption of law, and enacted that the executors of all testators dying after the 1st September, 1830, should be deemed to be trustees for the next of kin of the residue not expressly disposed of, unless it should *appear by the will or any codicil* that the executors were entitled to take the residue beneficially. In the case before us evidence *dehors* the will was relied upon to support a beneficial claim on the plaintiff of the executors to an unexhausted portion of the residue. Lord Langdale, M. R. "The act appears to me to require that the intention for the executor to take beneficially should appear by the will; and as it does not appear in this case, I am of opinion that the case is within the statute, that the personal evidence must be rejected, and that the residue belongs to the next of kin."

11. BREEZE v. HAWKER. 14 Sim. 350.

Evidence — Court Rolls.

This was a suit to recover a copyhold estate in Hampshire, and in support of the plaintiff's case examined copies of the Court rolls were tendered in evidence. The steward swore to the correctness of the copies. It was objected that no copies of Court rolls were evidence except those which were delivered to the tenant of the estate. But the Vice Chancellor of England held the evidence admissible.

12. POTTS v. DUTTON. 8 Beav. 493.

Solicitor — Costs — Ineffectual Conveyance.

Dutton was a trustee for sale, and contracted to sell the estate, which was situate in Yorkshire, to one Tindale for 650*l*. It was

stipulated that the expenses should be borne by the vendors. During the progress of the sale Dutton's solicitor became aware that the title deeds were in the hands of a party who claimed a lien on them. He nevertheless proceeded in the preparation of the conveyance and of a memorial for registration in Yorkshire: but the non-production of the title deeds obstructed the sale, and it was eventually abandoned. Dutton's solicitor, in his bill of costs relative to the trust estate, made charges amounting to 18*l.* 10*s.* for the conveyance and memorial which thus became useless. The cestuis que trust obtained an order for the taxation of the bill: and the Taxing Master disallowed the items in question. The matter was brought before the Master of the Rolls on a petition by the cestuis que trust to confirm the Taxing Master's report, and on a cross petition by the solicitor for the revision of the taxation. Lord Langdale, M. R. "The solicitor of Dutton investigated and made out the title, but he must have known that the title could not be made effectual to the purchaser without handing over the title deeds. . . . The question is simply this, whether, having made out the title and prepared a draft conveyance to the satisfaction of the purchaser, but knowing that he had not the title deeds, he was in strict duty right in proceeding to further expenses in getting the conveyance engrossed and stamped, or in preparing the memorial for registration; or whether he should not rather have stayed his hand until he had obtained the title deeds. There is no reason to suppose that he acted from any other than a zealous intention of having every thing ready for the completion of the purchase: but having incurred these expenses without being sure of carrying the contract into effect, who is to bear them? . . . The Taxing Master has refused to allow those costs. I cannot say that he was wrong."

13. FREER v. RIMNER. 14 Sim. 291.

Solicitor — Auction — Retracting of Biddings.

As Sir Edward Sugden appears, by the latest edition (1846) of his work on "Vendors and Purchasers," to retain the opinion which he had therein formerly expressed, that a condition against the retraction of biddings at an auction is one which cannot be enforced, a notice of the present case, in which the Court manifestly held a contrary opinion, is necessary, although the decision

was supportable on another ground. At a sale by auction, under the decree of the court, the highest bidder was the solicitor of a mortgagee, who, though not a party to the suit, consented to the sale. The bidder retracted his bidding before the hammer fell: but as the considerations of sale provided that no bidding should be retracted, the lot was knocked down to the solicitor, who under these circumstances proved to be discharged from his purchase. He relied upon the authority of Sir E. Sugden, and upon that learned judge's recent reiteration of his opinion. But the Vice Chancellor of England refused the motion in the present case with costs, on the additional ground that the solicitor of the mortgagee who had consented to the sale ought not to be allowed to defeat it.

14. MANTON v. ROE. 14 Sim. 353.

Creditor's Suit — Practice.

A creditor's suit having been instituted in the usual form, against the debtor's executor, the defendant moved, before decree, that the bill might be dismissed, on payment of the plaintiff's debt with interest at 4*l.* per cent. and the costs of suit; and the V. C. of England so ordered.

15. WINCH v. BRUTTON. 14 Sim. 379.

Trust — Precatory Words.

In courts of equity a great struggle is frequently made to construe the precatory or recommendatory words of a testator relative to the disposal or application of a bequest, into a positive declaration of a trust. It is required, however, for the establishment of a trust in such cases, that the words should be imperative, and that the subject of the trust contended for should be certain and definite (2 Roper, Legacies, 373.). In the present case the testator, after expressing his desire to make a suitable provision for his wife *as well as for his daughter and grandchild*, in order to mark his deep affection and unbounded confidence towards his wife, and his belief that she would be actuated by the most maternal regard towards their child, bequeathed to his wife all his property, *for her own use, benefit and disposal absolutely, implicitly relying* on her attachment to their daughter and grandchild. By the same will he afterwards "*conjured* his wife, under the advice of his executors, to proceed forthwith to *make ample provisions by*

deed or will for their only child and grandchild." The wife predeceased the testator; and the grandchild filed a bill against the executors to establish a trust in favour of herself and her mother, the testator's daughter, who claimed the whole property as next of kin of the testator. The husband of the deceased demurred for want of equity; and the V. C. of England allowed the demurrer. His Honour expressed a clear opinion that the absolute gift to the wife was not modified by the other clauses of the will.

III. POINTS IN THE LAW OF REAL PROPERTY.

1. Devise—Construction—"Effects." 2, 3. Lease—Forfeiture—Covenant to insure—Bankruptcy. 4. Wills Act—Lapsed Devise—Republication. 5. Dower—Mortgaged Estate—6. Terms Act—Satisfied Term.

1. DOE v. EARLES. 15 Mees. & W. 450.

Devise—Construction—"Effects."

In common parlance the word "Effects" is confined to things personal: and the court of King's Bench long ago decided upon this ground, that a devise of "all and singular my effects, of what nature or kind soever," does not pass the real estate of the testator, unless it can be clearly collected from some parts of the will that such was his intention. *Doe v. Dring*, 2 M. & S. 448. The cases are uniform in supporting this construction, except the *Marquis of Titchfield v. Horncastle*, 2 Jurist, 610., where Lord Langdale, M.R. appears to have thought that the word in question might originally have been construed to embrace all the effects, real and personal, of a man's industry, though his Lordship expresses no opinion against the propriety of the decisions which have taken place. Such being the state of the law upon this point, the subject lately came under discussion in the Court of Exchequer, upon the will of John Haw. The will was in these terms: "I John Haw do dispose of *all my effects* as follows:—all my household goods, live stock, furniture, plate, wearing apparel, *and other effects*, at this time in possession, or that hereafter become my property, unto my wife, Jane Haw. I do further bequeath to Jane Parker the sum

of 200*l.* to be paid to her at the death of my wife. But if my wife, after my decease, see good to marry, her second husband shall have no claim whatever, that is, *to sell or dispose of any part of the property now or may be hereafter in my possession.* But the above sum of 200*l.* shall be paid to Jane Parker at the time of my wife's marriage. And I do hereby declare this to be my last will and testament." The testator was seised in fee of some houses at Hoxton in remainder expectant on the decease of Martha Simpson. He had no other real estate, and the question was whether his remainder in fee passed by this will. The whole Court recognised the general rule as above stated. The Chief Baron and Mr. Baron Parke, however, held that the real estate was not effectually devised, on the ground that the will exhibited no such clear intention with respect to the disposition of realty as to take the case out of the rule of the decisions. Mr. Baron Platt was of the contrary opinion, and held, upon his view of the intention, that the will ought to be read as if the word *property* had been used by the testator instead of the word *effects*.

2. DOE v. GLADWIN. 6 Q. B. 953.

Lease — Covenant to insure — Forfeiture.

This case is an illustration of the peculiar rigour which a tenant incurs by not closely observing the letter of his covenant to insure. A breach of this covenant is generally made a cause of forfeiture by the terms of the lease. In cases, however, where a pecuniary compensation for breach of covenant can be effected, a Court of Equity will relieve against a forfeiture: *Reynolds v. Pitt*, 19 Ver. 134.: but the Court of Chancery considers the damage resulting from the breach of a covenant to insure as a matter totally incapable of estimation; and holds it impossible, therefore, to put the landlord in the same condition as if insurance had been regularly effected. In the case before us the lessee covenanted to insure and continue insured the demised buildings in the *joint* names of the lessor and lessee. For several years the lessee insured in his own *sole* name; and during this period the reversion frequently changed hands and became vested in different persons, to whom the lessee from time to time showed the receipts for the premiums up to Christmas, 1842: and the premium then paid covered the insurance for the year 1843. In January, 1843, the

present lessor of the plaintiff became the reversioner, and brought ejectment for a forfeiture by reason of the lessee not having insured the premises in the *joint* names, according to the covenant. It was urged at the trial that under the circumstances the forfeiture had been waived by the previous receipts of rent and the privity of the reversioners; but the jury, under Lord Denman's direction, found a verdict for the plaintiff, with leave to move to set it aside. The case was argued accordingly before the full Court, but without success. Patteson, J. "This ejectment must be considered unusually harsh, and it is impossible for any Court to lend itself willingly to enforce the proceedings. The expression that the law abhors a forfeiture was never more appropriate. But we must not forget that the legal rights of parties are all that we have power to deal with. Even the Court of Chancery has refused to enjoin against proceeding at law for breach of the covenant to insure, *Green v. Bridges*¹; and on occasions like the present, Lord Tenterden was in the habit of saying that we are bound to give to all instruments their natural construction, and attach to them their legal consequences, whatever our inclinations may be. This course may operate severely in particular cases: but its general effect is no doubt beneficial, by teaching all that they must fulfil their engagements, and by giving certainty to their mutual relations. . . . In this case there is nothing but verbal evidence that a landlord had said he would be satisfied though the covenant should be broken, which it indisputably was during the whole time that the premises remained uninsured according to the covenant: for the waiver, by acceptance of rent, could not operate beyond Christmas, up to which period that rent was accepted; and this being a continuing covenant, a subsequent breach entitled the lessor of the plaintiff to re-enter."

3. *DOE v. INGLEBY.* 15 Mees. & W. 465.

Lease — Forfeiture — Bankruptcy.

In the previous case the abhorrence with which the law regards a forfeiture was noticed by the Court. In the present case the Court seems to have acted fully up to the spirit of that rule. Lands and tenements at Mold, in Flintshire, were by deed de-

¹ 4 Sim. 96.

mised to Thomas Evans, his executors, administrators, and assigns, for the term of forty years, at the yearly rent of 55*l.*, with a proviso that the lessee should assign without the consent of the lessor, or if the lessee "should at any time thereafter during the said term commit any act or acts of bankruptcy, whereupon a commission or fiat in bankruptcy should or might be issued against him, and under which he the said Thomas Evans should be duly found and declared a bankrupt," the term should determine and be void, and it should be lawful for the lessor to re-enter. In December, 1838, Evans underlet with the consent of his lessor, and in December, 1839, he committed an act of bankruptcy by entering a general assignment for the benefit of his creditors. A fiat issued against him in the following January, and he was thereupon declared bankrupt. Under these circumstances the lessor brought an ejectment against the under-lessee, as for a forfeiture: but the evidence relative to the bankruptcy showed that the petitioning creditor's debt, on which the fiat issued, was proved as due to Rees and Guppy as partners, whereas it was due to Rees and Guppy and a third party as partners. The Court of Exchequer held that the fiat was invalid, and that no forfeiture had been incurred. Platt, B. "The lessor might well exact, and the lessee well concede, that an act of bankruptcy founding a valid fiat should operate as a forfeiture, and that the date of such forfeiture should be fixed by the act of bankruptcy upon which a fiat, supported by, amongst other things, a good petitioning creditor's debt, might issue. The lessee may say, 'I may have committed an act of bankruptcy; but if there was no good petitioning creditor's debt, I was not liable to a fiat, and I have not put myself into the condition of forfeiting the lease unless I am duly made a bankrupt.' And when we look at the history of these provisoes, and the manner in which the courts have treated them, one is led to believe that this must be the reason of the matter. The old provisoes providing mainly for forfeiture in the event of an assignment, the courts of law held that that applied to voluntary assignments only, not to involuntary assignments by operation of law. What is the object here? It is that the lessor should not have a new tenant of any kind or description, either by the voluntary or involuntary assignment of the lessee, forced upon him without his consent. The lessor provides against his having a new tenant forced upon him, by providing for the forfeiture of the lease in case of bankruptcy; but it would be carrying the case too far against the lessee, if we held that the forfeiture attached, if he committed an act of bankruptcy upon which a fiat issued,

without any petitioning creditor's debt, and where the estate is not validly assigned at all. It seems to me that we should, in that case, be carrying the proviso a great deal further than one can suppose was the intention of the parties." Pollock, C. B. "I think the lessee has not been *duly* declared a bankrupt, and that the defendant is entitled to our judgment." Parke, B. differed in opinion.

4. WINTER v. WINTER. 5 Hare, 306.

Wills Act — Lapse — Republication.

By the general rule of law, the death of a legatee in the lifetime of the testator creates a lapse of the legacy, which thereupon falls into the residue, or becomes undisposed of according to the tenor of the will. But a partial alteration was made in this rule by the Wills Act, 7 W. 4. and 1 Vict. c. 26., by the 33d section of which it is provided, that where a legatee is a child of the testator, and dies leaving issue, no lapse shall result from the legatee's death in the lifetime of the testator, but the bequest shall take effect as if the death of the legatee had happened immediately after that of the testator. It will be seen by the case of *Anstruther v. Chalmers*, 2 Sim. 1. that to this extent the law of England is now assimilated to the law of Scotland. By the 34th section the act is declared not to apply to any will made before the 1st of January, 1838; and every will re-executed, or republished, or revived by any codicil, is, for the purposes of the act, to be deemed to have been made at the time at which the same should be so re-executed, republished, or revived. The foregoing quotations from the act seemed necessary for the statement of the present case. The testator, John Winter, made his will in November, 1833, and thereby bequeathed a share of his residuary estate to his eldest son, John Palmer Winter, who died in November, 1838, having, by a will made in 1824, bequeathed all his estate, real and personal, to Mary his wife, whom he appointed his executrix; and she proved this will in December, 1838. In February, 1839, John Winter made a codicil disposing of the share of a daughter who had died since the date of his will, and in all other respects he ratified his will. The question was, whether, under the foregoing circumstances, the share bequeathed by John Winter to his son John Palmer Winter passed under the will of the latter. The V. C. Wigram, upon the construction of the statute, decided this question in the affirmative, in conformity with his Honour's pre-

vious decision in *Johnson v. Johnson*, 3 Hare, 157., where his Honour held that the will of the deceased legatee operated upon the legacy thus rescued from lapse by the statute.

5. *FLACK v. LONGMATE.* 8 Beav. 420.

Dower — Mortgaged Estate.

In a suit for the administration of the estate of Henry Flack, it appeared that he died seised of an estate; but it was doubtful whether he was seised in fee simple, or had a mere mortgage title, subject to redemption. The mortgage was created in 1754, and interest was paid until July, 1816. In the following few years proceedings took place for the redemption of the estate. But the only claimants were defeated in 1826, through a defect in their title; and at the time of the argument in 1845 nothing had appeared of the legal owner since the year 1781. Under these circumstances, the widow of Flack, who died in 1830, claimed to be entitled to dower. Lord Langdale, M. R. "In order to consider whether the widow is dowable, we must look at the matter as it stood *at the death of her husband*; and I have no hesitation in saying that he must be considered as having had a mortgage estate; for if any person claiming under the mortgagor had come forward, he would have had a right to redeem; and that was the situation of things when Flack died. . . . We are not to look at subsequent events. It may happen that at the present moment there is no right in anybody to redeem; that the time has passed; and that, if any claims to redeem were now made, the answer would be, 'more than twenty years have elapsed during which we have had undisturbed possession.' (Stat. 3 & 4 W. 4. c. 27. s. 28.) . . . But did this state of things exist at the death of the husband? Though the husband might have considered it as his own at his death, and though I may not *now* consider it subject to any claim for redemption, yet the quality of the estate, in the consideration of this Court, at the decease of the husband, was not such as to give a right to dower."

6. DOE v. PRICE. 11 Jurist, 131.

Satisfied Term — Stat. 8 & 9 Vict. c. 112.

Cadwallader Thomas the elder purchased lands in Merionethshire, subject to a mortgage for 600*l.*, secured by a term created in 1777. He afterwards paid off the mortgage, and in January 1806, he took an assignment of the term to a trustee to attend the inheritance. He died in November 1829, leaving two sons, Cadwallader Thomas the younger, and William Thomas. Cadwallader Thomas the younger, during his father's life, had occupied part of the lands as tenant to him; but on the father's death, Cadwallader Thomas the younger entered on the fee simple as heir-at-law. In July 1830, Cadwallader Thomas the younger mortgaged the lands by lease and release, and by a deed of the same date as the release, the term was assigned to a trustee for the mortgagee. Cadwallader Thomas the younger levied a fine to confirm the mortgage in the ensuing August, at the Great Sessions for the county of Merioneth. In July 1835, Price purchased the equity of redemption of Cadwallader Thomas the younger, and paid off the mortgage, upon which occasion, both the mortgagor and mortgagee joined in the indentures of lease and release, conveying the property to Price; and the term was, at the same time, assigned to a trustee named by Price to attend the inheritance. In 1845 an old will of Cadwallader Thomas the elder, devising the property to his second son William Thomas in fee, was discovered; and, thereupon, William Thomas brought an ejectment against Price, laying the demises as made by himself, by Cadwallader Thomas the elder, by the trustee of 1806, by the personal representative of that trustee, by the trustee of 1830, and by his personal representative; and shortly before the trial demises were added by a judge's order in the name of the defendant's trustee of 1835, and the personal representative of that trustee. At the trial, before Lord Denman, C. J., it was urged by the plaintiff, that the conusor, in the fine of 1830, by reason (it is presumed) of the then outstanding term of 1777, had no sufficient estate in the land to support a fine; and also, that in any view of that part of the case, the plaintiff was entitled to recover. Lord Denman, however, ruled, that under the stat. 8 & 9 Vict. c. 112., the term being a *satisfied* term, could only be considered in existence when required for the protection of the rightful owner of the property :

and he directed the jury to find for the defendant on all the demises. By leave of the learned Chief Justice, a rule, to show cause why a verdict should not be entered for the plaintiff, was moved for and obtained. On cause being shown, it was contended for the defendant, that he did not want the term of years for his protection, as his title to the land was complete without it, and the term, consequently seemed merged in the inheritance, under the stat. 8 & 9 Vict. c. 112. s. 1., or perhaps it might have been destroyed by the fine and five years' non-claim. But it was argued, that if the term was in existence at all, it could only be so for the purpose of protecting the owner of the inheritance under the latter part of that section, and could not be used by a stranger as a weapon against him. [*Parke, B.* You say, that it must be used as a shield, not as a sword.]

The judgment of the Court was afterwards delivered by *Parke, B.*—"At the time this case was argued, we gave our opinion on two of the points made, and took time to consider the third. The defendant was purchaser of this property for valuable consideration, and took an assignment of an old satisfied mortgage term from the trustee of a person who had taken a conveyance from an heir-at-law, who entered on the death of his ancestor, and levied a fine. We said, that the fine was good under the recent statute (5 & 6 Vict. c. 32. s. 2.), which was passed to remedy the negligence of the officers of the late Welsh Courts; and the heir-at-law having had sufficient title to enable him to levy a fine, the present defendant is in by good title, and does not require the satisfied term to protect him in his possession. The question, which remains to be decided is, what has become of the satisfied term under the 8 & 9 Vict. c. 112., which provides, 'that every satisfied term of years which, either by express declaration, or by construction of law, shall, upon the 31st of December, 1845, be attendant on the inheritance or reversion of any lands, shall on that day absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall be attendant as aforesaid; except that every such term of years which shall be so attendant as aforesaid by express declaration, although hereby made to cease and determine, shall afford to every person the same protection against every incumbrance, charge, estate, right, action, suit, claim, and demand, as it would have afforded to him if it had continued to subsist, but had not been assigned or dealt with after the said 31st December, 1845, and shall, for the purpose of such protection, be considered

in every Court of Law and Equity to be a subsisting term.' As the plaintiff has in his declaration a demise by the trustee of the term, added to that of the real claimant of the property, we must decide whether that satisfied term did or did not continue after the 31st December, 1845; and in order to do this, we must also determine whether a party claiming the protection of the term really was entitled to that protection against an incumbrancer, and as that is a question of equity, we have thrown on us the duty of a Court of Equity without the adequate machinery. Such, however, is the operation of the act; and we must therefore decide, whether the defendant, who was in possession, wanted the protection of this term. Now, as we have already held that he did not, seeing that he had the legal estate wholly independent of the term, his case does not fall within the latter part of the first section of the statute; but it falls within the former part of it, the effect of which is, that the term actually ceased and determined by the operation of the act on the 31st December, 1845; and, consequently, the plaintiff cannot recover on the demise of the trustee of the term. If it had turned out that the defendant wanted the protection of the term, on the ground that he was purchaser for valuable consideration, it would be necessary for us to consider what course he ought to take; probably it would be necessary for him to apply to a Court of Equity, or apply to this Court to strike out of the declaration the demise in the name of the trustee. But as he does not want the protection of the term, it has absolutely ceased and determined on the 31st December, 1845. The defendant is therefore entitled to a verdict on all the demises; and this rule must be discharged."

— Rule discharged.

LIST OF CASES.

Attorney General *v.* Malkin, 203.
 Bennett *v.* Busgis, 5 Hare, 295.
 Breeze *v.* Hawker, 204.
 Brooke, *Lord v.* Rounthwaite, 195.
 Brown *v.* Cole, 201.
 — *v.* Wilkinson, 194.
 Doe *v.* Earles, 207.
 — *v.* Gladwin, 208.
 — *v.* Ingleby, 209.
 — *v.* Preston, 192.
 — *v.* Price, 213.
 Duke of Leeds *v.* Amherst, 196.
 Flack *v.* Longmate, 212.
 Fowler *v.* Ward, 200.
 Freer *v.* Rimner, 205.
 Griffiths *v.* Lewis, 191.

Hearne *v.* Turner, 190.
 Kingdom *v.* Cox, 192.
 Leonard *v.* Baker, 193.
 Leslie *v.* Verschoyle, 194.
 Lister *v.* Turner, 202.
 Love *v.* Gaze, 204.
 Manton *v.* Roe, 206.
 Potts *v.* Dutton, 204.
 Reynell *v.* Lewis, 186.
 Sloman *v.* Bank of England, 197.
 Thornett *v.* Haines, 185.
 Walker *v.* Remmett, 193.
 Winch *v.* Brutton, 206.
 Winter *v.* Winter, 211.
 Wyld *v.* Hopkins, 186.

NOTE TO ART. I.

WE alluded at p. 16. to the opinions of the Judges on the subject of Transportation and Secondary Punishment. These have subsequently come into our possession, and we make some extracts.

“I think the punishment of transportation has been differently appreciated by criminals and the public within these few years, and is regarded with more apprehension than it used to be. I have perceived a considerable difference in the mode in which criminals and the bystanders receive such a sentence, and have tried criminals for returning from transportation, who have described its hardships, and earnestly entreated to be spared a repetition of it. I think, therefore, that the punishment of transportation does tend much to the repression of offences.

“I do not consider the inequality referred to in the tenth question is an objection to the punishment of transportation; any other fixed punishment, as well as that, must operate very differently upon persons of different habits, character, and circumstances, and of different situations in life. By persons of education, family, and property any punishment would be felt more severely than by the uneducated and poor; but then the crime is greater in the former class, for the temptations are less, and the means of resistance to them which a good religious and moral education affords are greater; and the public, and I think justly, respect the administration of justice the more where the punishments are apparently equal.

“Whether it be safe to abolish the punishment of transportation, must be in a great degree matter of conjecture. I think it is inexpedient to do so (looking only to the administration of justice here, and without considering the objection to continuance of transportation, arising from its effect upon the condition of society in the colonies, as to the weight of which objection I do not feel competent to offer an opinion). It seems to me very advisable to retain it for certain offences of a more serious character; for instance, rapes, aggravated manslaughters, malicious shooting and wounding, forgery, burglary, robbery, arson, returning from transportation, larcenies of post letters, &c. I would further suggest,

that the cases to which it should be applicable should be clearly defined, and less discretion left to the judges than they now are empowered to exercise ; and also, I cannot help thinking, that the sentence which is passed should, as a general rule, be carried into effect, subject, of course, to the exercise of the royal prerogative of mercy for special reasons in each case.

“I do not conceive it possible for a judge, with the means which a trial affords him, to ascertain whether a prisoner has a peculiar dread of transportation, and that his discretion, generally speaking, cannot be regulated by that consideration.

“I have not the means of stating what class of persons tried before me appeared chiefly to dread the punishment of transportation, and what class to care less for it, except that those who have already been transported, and have escaped, seemed to have great fear of suffering the same punishment again.

“I do not think that imprisonment is a punishment which has terror for the bulk of offenders, unless it be for a long time, and accompanied by whipping or solitary confinement.

“I think separation adds to the terror ; and the greater the time during which it is to continue the greater the terror.

“I have seen the operation of the separate system at Pentonville ; and, so far as I can judge from inspection of the prison, and communication with the prisoners personally, it seems to me likely to answer the combined object of punishment and improvement.

“I think it desirable to preserve the punishment of transportation, for the reasons before given, and to apply it to more aggravated crimes, as being better likely to answer the great object of punishment than imprisonment.

“25th March, 1847.”

“J. PARKE.”

“I entirely agree with what my brother has written.

“25th March, 1847.”

“J. PATTESON.”

Mr. Baron Alderson says,—

“I think the administration of the law as to juvenile offenders requires much amendment. We want prisons appropriated to them, in which they should be subjected to a paternal but severe discipline, and that not for short but for long periods, subject, however, to remission on amendment. I do not think it would be in accordance with the spirit of our institutions to have such terms of imprisonment indefinite, as some have suggested, or dependent upon a system like a debtor and creditor account, in which the prisoner has appeal if the account be unfairly kept. They should be definite, although long periods. In connexion with this I would desire to

see a minimum punishment fixed by the legislature, in order that injudicious magistrates may not indulge their spurious humanity at the expense of the public and the criminal: There are institutions abroad, such as that near Hamburg and the Colonie Agricole in France, and some also in England, which I should be glad to see adopted wholly or in part as models for juvenile reformatory prisons. As long, however, as juvenile offenders are mixed up in our gaols with adults no effectual improvement can take place. I have known an instance in which a regular plan for a robbery, which took effect and was tried before me, was laid in one of what is called our best regulated gaols, and on the treadmill. The instrument there was a boy, and the principals were adult thieves. I may add that I am fully persuaded that a judicious plan of reform for juvenile offenders would be the most economical as well as the most merciful arrangement which could be made. The expenses now incurred by their repeated re-committals and trials greatly exceed the probable cost of an attempt at an effectual reformation; and to cure this class of offenders would be to cut off one most prolific source of adult crime.

“I wish to add that it appears to me that no effectual reform in Prison discipline can take place so long as our county gaols remain on their present footing. What is wanted is, to have county houses of detention for untried prisoners, and district penitentiaries for convicted prisoners; and these last should be appropriated, one to adult males, another to adult females, another to boys, and a fourth to girls. Our present gaols may easily be adapted to this, by forming unions of several counties, and appropriating the different gaols to criminals from the whole union according to the above classification. But this will require the intervention of the legislature. Houses of detention must be built in each assize town.

“I look upon transportation, by which I understand a penal removal of offenders to another country, as a proper punishment to be retained in the case of all criminals. It is a balance of evils, and the less evil is in retaining it.

“There is no doubt that it operates very unequally on different ranks of society, but this is not of much moment, as the class out of which criminals generally come is for the most part the same. There is a great advantage often in removing the leaders of a body of offenders, and so breaking it up. This advantage applies more frequently in the country than in the capital, where, unfortunately, the class of leaders can never be got rid of effectually. The evil of transportation, as it now exists, seems to me to fall on the

colonies; the mother country, even at present, has much benefit from it. Whether it be just to inflict such an evil on the colonies is quite a different question, and one on which I entertain grave doubts. I am clearly, however, of opinion, that nothing can justify the mother country in sending out such criminals without a previous penitentiary system being adopted to make them less unfit to become useful members of a new society. I think if such a system were adopted, and those only sent out who appeared likely to behave well, much advantage would follow, as in a new country, where labour is at a premium, they would have a better chance of permanent amendment. As to the incorrigible, I think the mother country ought to keep them in imprisonment during the term of their transportation. There are some odious offences for which that punishment, even for life, and which should include separation, appears to me the only proper course to pursue. But these arrangements require an act of parliament to make them legal. I do not think the punishment of transportation should be appropriated to those classes who dread it most: that would be to make punishment partake of the nature of revenge, which is utterly wrong. I have, however, no means of judging what class dreads it most. I do not think that more promptly carrying into effect transportation would be of any use. I do think that short periods, as seven years, are undesirable. In practice I believe that such cases are seldom actually sent out of this kingdom."

POSTSCRIPT.

THOUGH what are generally termed political subjects do not come within the scope of our plan, yet we must not pass over an event so important to Legislation, and indeed to Law, as the establishment of a Popular Constitution in one of the great European monarchies; and as we happen to be possessed of some information connected with the subject and with its reception in Germany, we shall devote a short space to the matter.

The King of Prussia, a prince universally respected and

beloved for his steady good faith and paternal care of his people, as well as admired for his great talents and the enlightened views of policy which guide him, has shown himself to deserve the proud name of a "Patriot King," by his late proceedings. He has, without being beset by any solicitation, much less as yielding to any pressure from without, freely granted a new constitution; or, at least, made the most important step towards establishing a new constitution in his vast and various dominions. The outline of the plan is this: —

There are two bodies or Chambers of Parliament formed; one of the Nobles, the other of the Commons. The nobles consist of three orders, but properly are ranged in two divisions. These orders are nobles or seigneurs, knights, and clergy; but as among the nobles are classed not only princes and peers but churchmen, so churchmen are added to the knights also. The princes, peers, and knights are hereditary, being originally created by the Crown here, as in every other country. The clergy are the representatives of the churchmen, and are chosen by them; in Prussia there are no Prelates. The Upper class, or House, thus consists of two distinct bodies, Nobles and Knights, to each of which bodies clergymen belong. The two together are about 250. The Lower House, or that of the Commons, consists of the elected representatives of the peasants and of the burghers; and as the whole body of both Houses amounts to 618 persons, the Commons are above 350. The three bodies all sit together, voting separately.

There can be no new tax imposed, nor any new distribution of any existing tax, unless in some emergency of war, without the consent of two out of the three bodies — the Nobles, the Knights, the Commons. The majority of the three thus binds the dissentient body, should they differ among themselves. The principal landowners are all, or nearly all, in the two former bodies; but many of the peasants have considerable estates in land, some even receiving 900*l.* or 1000*l.* rent from their possessions.

The confinement of their functions to the important matters of revenue, of public supply and expenditure, proves

nothing against the great value of this plan. We know how vast is the power of the purse even now in this country; it has reduced the veto of the Crown to a mere name. We know, too, that out of this power in past times has arisen our whole popular constitution; and even now it forms almost the whole weight of the people in legislative proceedings.

But, moreover, the Chambers are endowed with the important right of Petition. This was with us so entirely the origin of all the legislative powers of Parliament, that to this day acts of Parliament are Petitions (*bill* meaning *petition*) assented to by the Crown. However, in truth every one must see that where there are deliberative chambers established, and one of them represents the community at large, the foundations of every popular right and all social improvement are laid. His Prussian majesty has done wisely in beginning thus cautiously his great reforms, and he has added another of equal value by abolishing the censorship of the press.

The alarms felt in Germany on these important proceedings are, we would fain hope, confined to a few statesmen of an obsolete caste and school. We have, indeed, reason to believe that even the measure concerning the press is favourably regarded by all the courts, some two, or at most three, excepted.¹

The series of important changes in the transaction of the private business of the House of Commons has proceeded during the present session without any opposition. The Committee on Private Business have examined other witnesses who have further established the expensive and unsatisfactory nature of the old system; and, among other

¹ We may here briefly notice a work lately published by an eminent lawyer in Scotland, Mr. Reddie, of Glasgow. This gentleman is one of the most profound juriconsults of the age, and he has long devoted much of his attention to the study of International Law, which his work treats with distinguished ability and ample information. We may, perhaps, give an account of it in detail hereafter. At present we indicate it to our readers as of very singular value. Mr. R. was originally at the Edinburgh Bar, and was destined to fill the highest judicial offices. But he retired in early life to a place of great importance, and *quasi* judicial also, in Glasgow. He has there pursued his favourite studies, and this work is the result. We are sorry that want of space confines our present notice of it to a mere reference announcement.

things, the necessity of a taxation of all parliamentary costs; and the committee have reported (29th March, 1847), that it would be expedient that the Speaker should prepare a table of fees constructed upon the principle of substituting a few larger fees on the principal stages of the Bill in lieu of a great many small fees now charged; and further, that a Bill should be brought in enabling the Speaker to appoint a taxing officer or officers, who shall have all the powers possessed by taxing masters of the Court of Chancery, and shall examine and tax as well all preliminary expenses incident to applying to Parliament for private bills, as all charges for soliciting or opposing the same. Mr. Hume, as chairman of the committee, has accordingly obtained leave to bring in a Bill of this nature. Further, in pursuance of the recommendations of this Committee, the following resolutions have been come to:—"That all committees on Private Bills be constituted of five members only, who shall be appointed by the Committee of Selection, in the same manner as committees on Railway Bills. That the Committee of Classification shall form into proposals Bills which, in their opinion, it would be expedient to submit to the same Committee. That the resolution of the House of the 3d day of February, 1847, relating to Railway Bills, be extended to all Private Bills. That at the commencement of each Session, a panel of chairmen of Committees on Private Bills be supplied by the Committee of Selection, and reported to the House, and that the chairman of every committee be selected from such panel."

The tendency of all these important changes is obviously to select those members of the House who are best calculated to conduct the business of committees, and to give the tribunals composed by them as much of a judicial character as possible. Our readers will possibly remember that we have steadily kept in view these points in all the observations which we have submitted to our readers on this subject. It must not be supposed that this is mere economical reform. The saving effected by it, more especially in the new mode of proving the standing orders, has already been enormous, but when the changes are completed this will be perhaps the least benefit. The interest of the community will be protected—trustworthy information will be obtained—the reconciliation of many local differences; these are some of the

advantages which will be insured. When we have the whole of the evidence before us we shall be prepared to lay the principal points before our readers (if it appears necessary). In the mean time we should be doing great injustice if we omitted to say that the public are indebted for these reforms principally to two persons: 1. The present Speaker, who might have effectually thwarted them for the time, instead of assisting them most readily as he has done; and to Mr. Hume, whose energy, perseverance, and enlarged views on this subject are entitled to the highest praise.

Legal education, as promoted by the Inns of Court, is slowly proceeding. We are informed, that the Inner Temple will appoint the Lecturer on Common Law in the present term, and Gray's Inn, the Real Property Lecturer immediately after the term; but no further step has, at this time, been taken respecting the Lecturer on Equity, by Lincoln's Inn. While the foundation of a system, which we believe will be attended with the greatest benefits to the country, is thus being laid, we find how much we are behind our neighbours in France in this respect. By a *projet de loi*, presented this session to the Chamber of Peers by the minister of public instruction, we see that the schools of law in eight of the principal provincial towns are each provided with five professional chairs, while Paris alone possesses eighteen, which, however, it is proposed to somewhat reduce. The courses of lecture and of study extend to Roman law, the civil code, civil and criminal practice, procedure, criminal legislature, the commercial code, the law of nations, the history of Roman and French law, French constitutional law and comparative criminal legislation. The number of provincial students of law is more than 2000, and those in Paris exceed 3000, making in the whole 5300, all of whom attend these lectures. Surely this should give a sufficient encouragement to proceed in this country vigorously and heartily.

We are glad to receive the co-operation of our contemporary the *Edinburgh Review*, on several subjects which we have endeavoured to keep before our readers: — a codification of the criminal, and subsequently of the other branches of the law — revision of the statutes, past, present, and to

come, and for these purposes, and all others connected with law reform, the appointment of a MINISTER OF JUSTICE. In an article in the last number for April (the first of a new reign) all these things are fully insisted on. The last is the most important of all. There must soon be a Department of the State charged with the revision of the law. "The evil," says the Reviewer, "must at last become too great to be borne, and will bring its remedy. But then the pressure probably will be so urgent that, as in other reforms, too long delayed, there may be neither the leisure, nor the knowledge, nor the temper necessary to guide us right. The characteristic defect of our present system for the performance of such a task is the want of due machinery."

"A bill to consolidate the Statutes and amend the Law of Bankruptcy," has just been brought into the House of Lords by the Lord Chancellor. Lord Brougham had previously brought in a bill to amend the law relating to Insolvency, whereby it is proposed to transfer the jurisdiction as to Insolvent Debtors to the Insolvent Commissioners, and to the new County Court Judges; to abolish the Court of Review; to limit the number of Bankruptcy Commissioners in town to three, and to make some other changes. This latter bill has been referred to a select committee. Lord Brougham has also renewed a bill relating to Vexatious Actions, which was most needlessly postponed last year in the House of Commons, and to which we then adverted. A better fate we do not doubt will attend it this year.

We have to mention the death of Mr. Sidebottom, a very eminent conveyancer, a man of very vigorous mind, and a good law reformer, as is shown by his evidence before the Real Property Commission.

April 27. 1847.

ERRATA.

Page 85. l. 14., the words "landlords are our statute makers," should have been placed under inverted commas as not being part of Blackstone.

Page 204. l. 7. from bottom, for "being," read "not being."

Page 243. l. 5., for "even," read "ever."

— l. 21. for "of," read "to."

THE LAW REVIEW.

ART. I. — LEGAL EDUCATION.

A CONSIDERABLE time has now elapsed since we at some length brought before our readers the important subject of legal education, and as connected with it a law university¹; and in the interval it has been taken up in parliament. Mr. Wyse, a gentleman greatly to be commended for the pains which he takes upon the improvement of the higher branches of instruction, moved for a Committee in the House of Commons; and as any one can now-a-days obtain a Committee on almost any subject, he succeeded. The House is eminently an inquiring body, and almost as remarkable for doing little or nothing after the investigation is concluded. "Look at every thing, and touch nothing," seems with the Commons as with the gardeners, the motto on all occasions. However, it is doubtful whether any good would have resulted from fingering in this case; and possibly the principle of the motto was for once well applied. The inquiry proceeded; and although we cannot always conscientiously praise the Commons for conducting their investigations with the same method and clearness as the Lords usually do — although their questions have little method, their subjects no arrangement — although their course is on the whole somewhat rambling — yet we must fairly own that these, the almost universal failings of committees in the Lower House, seem to have been far less

¹ 1 L. R. 144. 345.

prevalent on the present than on almost any other occasion since the famous Bullion and Education committees, which were under the guidance of professional men; and we can have no hesitation in admitting that a very valuable body of evidence has been collected, giving both the information most useful in discussing the subject and the opinions of experienced men, most important to enlighten and to guide us through that discussion. The volume consists of above five hundred pages, three hundred of which contain the examination of twenty-eight witnesses, and the rest give papers of moment connected with the question; and the whole is prefaced by a very long and not a very clear report, occupying sixty pages, and concluding with thirty-four resolutions, so remarkable for want of method and prolixity, that a great part of what is mere statement of fact, and another part the statement of mere reasons, are to be found in these resolutions of opinion, only three or four positions being contained in the whole; and some of them are half a folio or three-quarters of a folio page in length. But in spite of this great defect, the report is useful, as giving a very elaborate summary of the evidence, with marginal references to the examinations themselves; so that it forms really a useful key to the voluminous mass. This document is given under three heads: The present State of Legal Education in England and Ireland; the Effects which this very Defective State produces; the Means of Improving it.

Our readers are aware, most of them by their own experience, all of them by our full statement in former numbers, that nothing can possibly be conceived more entirely defective, hardly anything more absurd, and even ridiculous, than the preparation given for being admitted to practise at the Bar, by the Inns of Court, which have the monopoly of legal education in England and Ireland, as well as of admission to and expulsion from the Bar. To describe as education, or anything approaching to it, what is done by these societies, would be a gross abuse of terms. In truth, they no longer affect to call it education. They fairly admit that they have no means of instruction; they deny that they have any vocation to teach; they, nevertheless, describe their matriculated youth by the name of students; and they guard jealously

the exclusive right of conferring upon those, whom they neither instruct nor cause to learn, the degree of Barrister, and the privilege of practising at the Bar. They regulate the terms of their admission to this degree and these privileges; they prescribe the conditions of obtaining that admission; they go further, and call upon students, or so-called students, to undergo a deceptive mockery of examination, which implies no qualification whatever, and means absolutely nothing.

The course is this. A young man is entered of an Inn, as a matter of course, indeed, as a matter of right, unless some conviction or other disqualification prevents it; he becomes on the books of the Society a student; he deposits a large sum as a security for the expenses of keeping terms; he keeps twelve terms. Now what goes by this name is the being present five times, or, it may be, three times, at the moment when grace is said before meat in the dinner hall of the Inn. This is keeping a term; and this is to be repeated twelve times in the course of three years or more; he must, therefore, have been three years at least on the books, and if he has the degree of Master of Arts at a university, English or Irish, not Scotch, he may be called to the Bar at the expiration of that time: if not, he must be five years¹ on the books. He, moreover, must keep six exercises; and this was originally something like a test of learning; for it was an argument which he must hold on a point of law. It is now, and for some ages² has been, a mere form. The student comes up to the Senior Bar table after the benchers have dined, and he reads the first three words of a slip of paper, just put into his hand by the steward or other servant of the Inn. No sooner has he read the first words of the paper, as, "I maintain that the widow shall have her dower," than the barrister makes him a civil bow, and he retires, having kept his exercise. The benchers on their part retire to drink their wine in the inner room—the combination room, as it is called by fellows of colleges.

¹ In two Inns, the Middle Temple, and Gray's Inn, three years have recently, we believe, been made sufficient; but this makes no material difference so far as our argument is concerned.

Such is the whole discipline and preparation for being called to the Bar. The Irish student keeps nine terms in London and three at King's Inn, Dublin, and is called to the Irish Bar in like manner. In Scotland it is otherwise. There is an examination on the whole of Justinian's Institutes, and on the whole of Erskine's Institutes of the Law of Scotland; and although this is not a very severe examination, the indecency never can happen in Scotland which may any day be exhibited here, of a man being called to the Bar who never opened a book in his life—nay, who is incapable of reading one line, or even of signing his name otherwise than with a mark or cross. Such an outrage on all common decorum is quite possible in England and Ireland; quite impossible in Scotland. A few years ago the Scotch trial was far less severe; indeed, it was almost nothing; but it has lately been much improved.

It is in vain to urge as a palliation of this abuse, which admits of no defence, that the law can be best studied by reading in private, or by receiving instruction under a master privately attended.—Be it so—Then why are the Inns of Court maintained in their exclusive privileges? Had they begun by refusing to teach—had they from the first avowed that they only kept a number of chambers where students might lodge at a very high rent, and a table at which they might dine some ninety or a hundred times a year—had they commenced their proceedings by declaring themselves not instructors but board-and-lodging-house-keepers, assuredly they would have been as little likely to be intrusted with the superintendence of the profession, and the monopoly of admission into it and expulsion from it, as their brother and sister dealers in bed and board, who advertise these articles on the windows of houses situated in the streets leading out of the Strand. It is, moreover, remarkable enough that the heads of the Four Societies, (that is, the governing bodies,) who are the Benchers, exact from the students not only extravagantly high rent as tenants, but a sufficient surplus over and above the cost of the dinners provided, to afford very much better fare both in meat and in drink to themselves. While the student and the outer barrister receive a frugal though wholesome dinner of two dishes, at most three, good, perhaps,

but very plain and cheap, and a pint or half-pint of the cheapest wine each, the heads of the society fare sumptuously every day, dine off all the delicacies of each successive season, drink without any stint the very choicest and dearest wines, sit down after dining to a dessert, often with ices, quaff coffee and liqueurs at the close of their learned potations; yet the benchers and the students pay exactly the same sum daily for this very diverse fare. We state these things reluctantly; but the Inns deserve it; for having shown by their constant demeanour that while dead to their duties as teachers, and only alive in affording lodging and food, they are even unjust and unfair as innkeepers, treating their guests and themselves in an extremely different fashion. There is no possibility of getting over the fact that the Inns of Court were established for the purpose of teaching, and have been kept up for the purpose of eating. They were endowed with large revenues at the expense of the public, and invested with the exclusive privileges of calling to and expelling from the Bar; in order that legal education might be under a vigilant, an able, a learned, and an efficient superintendence. They have long ceased even to affect any thing like education, and they have only retained their revenues, their monopoly, and their dinners. To complain then of our criticising the fare which the Inns of Court give us, or the prices which they exact for it, is about as unjust as it would be to complain of travellers for objecting to the entertainment which they receive at the inns on the road, and the bills which the innkeepers bring in. Were the former still instructors of youth, did they superintend the education of the students, and examine the candidates for admission to the Bar, we should be altogether incapable of quarrelling with them for their bill of fare or of price. But as no innkeeper on any road contributes less to the qualifications of the lawyer, or the examination of the candidate than mine host of Lincoln's Inn, we are not only free, but we are called upon to try his merits in the only capacity in which he makes known his claims to public favour; and we may, therefore, reasonably, and if not without offending, yet without just cause of offence, declare our opinion, that he and his

three brethren of the bottle and the knife, treat the bulk of their guests very scurvily, and make them pay out of all proportion to the entertainment which they provide.

It may, however, be said, that some kind of superintendence is exercised by the Inns over the character of those who enter and of those who are called to the Bar. This topic is extremely unfortunate — it is even perilous for the Inns of Court.

In the *first* place, were it ever so true, it removes no part of the main charge brought against all the Societies, that they contribute nothing to the Legal Education of the students or of the community at large. Be their conduct towards those students ever so beneficial in other respects, ever so well calculated to keep this class free from all contamination of unworthy characters, still we should have a right to ask why they give no instruction in the law to those whom they alone can admit to practise as lawyers. That they prevent improper persons from becoming barristers is nothing, if moral impropriety alone works the rejection of candidates. Ignorance of law and of every other branch of knowledge, be it ever so profound, ever so openly avowed, is admitted to be beyond their cognizance; and certainly this is, of all disqualifications, the one that should most surely work rejection.

But, *secondly*, there is no ground for supposing that the discipline bragged of is very able and very impartially maintained. We know that on one occasion the Bench of Lincoln's Inn passed a resolution rejecting absolutely from its books all who had ever reported for the newspapers. That this resolution, alike absurd and iniquitous, was almost immediately rescinded, proves nothing in favour of the Inn. The revocation was only made after several speeches had been delivered against the Inn by distinguished members of the House of Commons, and a plain indication given of the determination to abridge and control the powers of those bodies, should the obnoxious resolution be persisted in. Other instances might be added of the most inquisitorial proceedings carried on, and carried on secretly by the Benchers. In one very recent instance the Lincoln's Inn Bench occupied itself for months in examining many witnesses, not on oath, and not in any way punishable for false deposition — occupied

itself in the most irregular manner that can be conceived, allowing strangers who were no parties, to make speeches — witnesses to attend accompanied by their attorneys — nay, one witness to cross examine another, who was called to impeach his testimony. So flagrant was this proceeding, that some Benchers, and those among the most considerable in station at the Bar, or rather on the Bench, absolutely refused to attend; and one, if not more, are even reported to have resolved upon leaving the Society, in order to shun all fellowship with such inquisitorial proceedings — proceedings so very liable to be grossly abused. What has happened in one Inn might happen in all the others; and it is sufficient to state the not remote possibility of such grievous misconduct, in order to show how dangerous it is to leave the Societies their present power. The Benchers of each Inn sit in private, and in private they deliberate upon the admittance or the rejection of each student; the call, or the refusal of the call of each candidate for admission to the Bar. They deliberate too in the absence of the party, who only learns their decision after it is pronounced, and is utterly ignorant, or, at least, may be utterly ignorant of the grounds of the determination. When a person is admitted of any Inn, he acquires by law a right to practise as a conveyancer or as a pleader below the Bar, both in Courts of Law and of Equity. He is in the receipt of a professional income by such practice, only paying a certain tax to the state. Of this income he may any day be deprived by the sentence of the Benchers, who, if they choose, may expel him from their Inn, without any inquiry conducted in his presence; or who, if they please to hear him, and confront him with his accusers, cannot either call any witness, or help him to obtain the testimony of any witness, or administer an oath to any witness, or in any way punish for false deposition and for conspiracy, or for refusal to answer one question after other questions have been answered. The charge may have originated in malice or in professional jealousy, and may have been supported by a combination among false informers; yet no one can suffer the slightest punishment for these proceedings, and, therefore, no evil-disposed enemy can run the least

risk in his course of falsehood and of malice. This is a tribunal, and these are proceedings very little in accordance with the Law and the Constitution of England.

'It is no doubt true, that there lies an appeal from the Benchers, possibly from those of one Inn to those of the others; certainly to the Judges.

The former appeal is rendered absolutely nugatory by a rule laid down in all the Inns that whenever any person is expelled from one, or refused admission by one Inn, to the Society, or the Bar, a notice shall be communicated to the other Inns and the *comitas*, the courtesy, is quite universal among them all to refuse the party whom any one rejects. Herein the legal innkeepers act differently from their brethren of the road, whose competition is of some benefit to the public. The appeal to the Judges is, no doubt, a more substantial benefit; yet it appears not to afford a very adequate remedy; for though the party is heard, and may appear by counsel, the Court sits in secret, the Judges have a great leaning towards the Inns, and they act wholly without appeal or revision — their decisions being altogether final. The truth is, that an idea has sprung up, and become general, and even universal in the profession, that the Inns of Court are *quasi* private societies, invested with property, and keeping chambers, and giving and eating dinners, and that they are to do pretty much as they please "with their own," and not to be interfered with unless on some very rare and extreme emergency. At one time, and that only a few years ago, the Court of King's Bench absolutely refused to interfere when a party, rejected by Lincoln's Inn, without any reason assigned, applied for a mandamus to hear him, and admit him or assign reasons for refusing. The ground on which the Court appeared to proceed was, the impression they laboured under that the societies, being a kind of private bodies, were not to be interfered with.¹ It is true that the Judges are now reported to have changed their opinion upon the question whether or not the Court had a right to issue the mandamus in the case referred to; but the impression

¹ 4 B. & C. 855. See 4 L. R. 202.

still prevails of the Societies being rather private than public bodies, as regards their chambers and their halls. The prevalence of this feeling is strongly illustrated in what passed upon Mr. Hayward's case, who appealed from the decision of the Inner Temple refusing to make, or, as it is appropriately termed, *invite* him to the Bench when he became a Queen's Counsel. The constant practice, amounting almost to a strict rule, had been in all the Inns to call every barrister who became King's Counsel.¹ But from certain objections of a personal nature taken to Mr. Hayward, he was refused on the ballot, it being the custom at the Temple to ballot, and one black ball sufficing to reject. An appeal being taken to the Judges, the case was heard, as usual, in private, those Judges sitting, as is said, not *in curiâ*, but *in camerâ*. They did not consider themselves entitled to reverse the decision of the Bench, and order Mr. Hayward to be called, but they recommended a different form of voting, namely, that the ballot should be disused.² Every one must here perceive that the impression was strongly fixed on the minds of the Judges of the Inns being private societies, and exempt from full and effectual supervision. Every one must also allow that Mr. Hayward suffered a serious injury in being refused what was in all, or nearly all, other cases given as a mark of respect quite of course. And if, as is generally believed, he explained satisfactorily the matters imputed to him, he was an ill-used man. Yet this injustice arose out of the notion that the Inns cannot be interfered with, except in their refusal to call or admit, and in their expulsions from the Society and the Bar.

Properly speaking, for our present purpose we have nothing to do with the rights and privileges of the Inns,

¹ At one of the Inns (Gray's Inn) it is stated in their regulations to be the invariable practice. See Legal Education Report, Appendix, p. 311.

² The judges "strongly recommended the benchers of the Inner Temple in future to conduct their election to the bench on some more satisfactory principle." See the judgment given, 5 L. R. 430. It is understood that the benchers thereupon agreed that instead of *one* black ball excluding, *four black balls* should exclude. Whether this was the "satisfactory principle" suggested by the judges may be considered doubtful.

except as connected with the important subject of Legal Education. But it is necessary to look at their title as private bodies, exempt from judicial visitation, and yet exercising great public functions. It is in vain for them to reject all interference, and to say that they are only private societies, who may manage in their own way their own affairs. Their affairs are those of the community, unless they choose to renounce all claims to a monopoly of admitting barristers. Let them no longer possess the sole power of calling to the bar, or of disbarring or expelling from the profession, and they may let their chambers and eat and provide their dinners as they please. Nor will any one be disposed to complain of their setting apart no portion of their ample revenues for the instruction of youth in order to become members of the legal profession. But as long as they alone can call and disbar, surely we have a right to ask what use is made of their funds, and to require that teaching, as well as eating, shall be cared for.

If they say that their income will not afford the expense of instruction, then we require that their table shall be contracted of its superfluities — that their feast shall be shorn of its lustre. Dining is not necessary to the existence of a learned body; sumptuous fare at dinner is still less necessary. But preparing youths for the profession, and seeing that unfit persons are not admitted among its members, are so essentially necessary to the useful, or even the intelligible existence of the Four Societies, that, if neglected, their privileges become not only oppressive and injurious, but absolutely ridiculous. It would not be more absurd, more laughable, for the landlord of the Spread Eagle or the Baldfaced Stag to hand the weary traveller a volume or two from his bookshelf, and bid him go to the butchers and bakers for a dinner, than it is for the Inns of Court to give only lodging and entertainment to students eager to learn the law, and bid them go elsewhere for teachers. We know that at the ordinary inns the conduct referred to would occasion the forfeiture of their licence, and is even liable to indictment as an offence at common law. The licence is forfeited, and the innholder is

indicted because he enjoys the monopoly of receiving way-faring men, and it is an implied condition that he provide entertainment for them. The Inns of Court have their monopoly of receiving candidates for the Bar, and it is an implied condition that they provide due instruction to those candidates. Let them beware lest a new law be made to meet their case.

But it seems that the Inns of Court have at length awakened to a sense of their duty, and have resolved to appoint professors who shall teach the law. The Middle Temple, under the highly respectable auspices of Mr. Bethell, now at the head of the Chancery bar, had the great merit of setting the example by appointing a professor of civil law, and Mr. Long, appointed for the worthy purpose, has lectured with considerable success during the last nine months, and may as he acquires practice, improve the merit and augment the interest of his course. The other three Inns took up the subject, and appointed delegates of their respective benches, who met those of the Middle Temple, to discuss the important matters connected with Education. The twelve delegates met frequently in the chamber of the Inner Temple, and Lord Brougham presided over them. His evidence in the Appendix to the Report of the House of Commons' Committee informs us that a plan was agreed upon for appointing four professors in addition to the one already named by the Middle Temple, three to be named by the three other Societies respectively, and the fourth by all the Four Societies jointly. The subjects agreed upon were equity, property law and the practice of conveyancing, common law, criminal and constitutional law. It was deemed right that each professor should have a fixed salary to give him a secure provision, and that he should be allowed to take class-fees of a pound from each student, to give him an interest in the success of his teaching. The Inner Temple and Gray's Inn have appointed competent professors; Lincoln's Inn alone has the unenviable singularity of having as yet taken no steps whatever to redeem the pledge given by it according to the resolutions of the delegates; and the reluctance of that

wealthy and distinguished body to stir in the good work, has likewise prevented the appointment of the fifth professor, whom all the Four Inns are to join in naming.

It would not be easy to describe the contempt into which this conduct has brought that Society; nor is it possible to wonder at such feelings. The chances are that men of respectability in the profession will decline belonging to a body of which the proceedings are marked by such a disregard of its plain and manifest duties, as well as of the good faith proper to be observed in all treaties between public bodies. The dislike to be any longer connected with this Inn may not unnaturally be augmented by reflecting on the strange proceedings which it has lately thought it becoming to adopt in receiving and examining charges against its members. Moreover, we do not find upon inquiry that the dinners of the Lincoln's Inn Bench are less sumptuous than they were before the convention with the other societies was made and broken — broken, as is reported, on the flimsy and indeed false pretext, that their funds cannot afford to pay the poor pittance of 300*l.* a year for a lecturer. But we will venture to affirm that 800*l.* a year does not pay the whole expense of the bench table, and we hesitate not to affirm that it is the bounden duty of the Benchers to cut that expense down to 500*l.*, if such a retrenchment were necessary to the performance of its duty towards the profession, and the fulfilment of its contract with the other three Inns.

If we are asked whether or not we think that the plan now adverted to, of merely appointing five professors, is sufficient to meet the admitted exigencies of the case, we, without hesitation, answer in the negative. We think this a most excellent beginning, but that much more is wanted; and we described in our former paper the plan which seems the best adapted for the purpose of promoting legal education; namely, that the Four Inns should join in forming a Law University, under the control of a body of delegates from them severally, and with rules or statutes for the conduct of the joint institution. These statutes should, above all, provide for the discipline of the students, the attendance at lectures, the granting of degrees, the terms of admission to the Bar. The

limits of the administration would be secured by the election of the heads from each Inn; and as a charter alone to this new university would not be sufficient to give the powers required; it would be necessary to have an act of parliament, by which everything might be arranged, including, of course, the power of making by-laws, these being laid regularly before the Judges who should be the visitors. That the Inns themselves have not adequate powers must appear evident, when we consider, that if certain examinations were prescribed as the test of fitness for being called to the Bar, a question would certainly be raised by the rejected candidates as to the right of the Societies to exact such qualifications, especially from students already admitted, and having, as it were, an inchoate right to be called.

This naturally leads to the consideration of the rights and privileges claimed by the Inns of Court. Now we hold it to be abundantly clear, that all these bodies can possibly pretend to have in their own right as private owners, is their buildings, lands, books, and funds,—in a word, their property. With this it is, we cannot say impossible or unjust, for the Legislature to interfere; because interference with the property of corporate bodies, and even of individuals, for the public good is a very ordinary occurrence. But it is highly inexpedient to interfere with such rights even of corporations, unless when they grossly mismanage their concerns, and, especially, when they misapply their property, as where it was conferred on them for one purpose, and they either fail to apply it according to its destination, or apply it to other purposes. However, we may grant that the Four Societies should be suffered to retain their funds and other property untouched. But then comes the question, what shall be done with their privileges? Nothing can be more clear, than the right of the State to interfere with these, and either to control the Inns in the exercise of them, or, if expedient, to take them altogether away, or to make other bodies share them. If the Inns refuse to educate, and to educate in a satisfactory manner, and in an ample measure, the Legislature is both entitled and bound, either to deprive them of all right to admit and to degrade barristers, or to

erect other bodies with the same privilege. Of this no one can affect to doubt.

It has been proposed to issue a Commission for the purpose of examining the whole subject of Legal Education. To this opinion the Committee's report, and especially the questions put to the witnesses, show that the promoters of the inquiry strongly leant. There are plain indications that this was only abandoned by the Committee in deference to the decided and authoritative opinions of the Judges and lawyers examined. But it seems also clear that a fear of interfering with the Societies was in part the deterring cause. And the report states the propriety of having recourse to such an expedient, in case, after this fair warning, the Inns should fail to discharge their duty of providing for Legal Education. We hold this to be a foolish mode of viewing the matter; commissions have been multiplied of late years by the divisions, and the imbecility, and the tergiversations of governments. The ministers were sometimes afraid of their adversaries, sometimes of their friends; or they had been committed to one view of the subject, and wanted a pretext for getting out of it; or they were unable to grapple with a question, and would lay the load on others; or they were afraid of incurring responsibility, and would have a screen between themselves and censure; or they had no opinion at all, and wanted others to think for them. The task of governing the country was thus to be performed by deputy, and irresponsible persons were to rule the state. Mr. Bentham's plan of hired and paid law-makers was all but realised. The expense was not inconsiderable; and so many commissions were sued out by the government that one might expect finally some other party to sue out a commission of bankruptcy against it. It is very creditable to the committee that they have at least given up for the present their favourite plan.

There is one most important matter connected with this subject, a matter which cannot on any account be passed over; — we mean the education of Attorneys and Solicitors. There is nothing more essential to the best interests of the community than the due preparation of these persons for the important duties of their profession. Nothing can more nearly

concern all owners of property than that those in whose hands they are of necessity placed should be well qualified to advise them well. A vast number of questions continually arise which the solicitor must decide at once and without aid of counsel. Much depends on their conduct of business, even when counsel are employed. The cases and abstracts laid before counsel are wholly prepared by the solicitor. The management of the cause out of court is altogether in his hands. Were a man to choose between having an able counsel and an able solicitor, we hold it clear that his preference, if it must be given, should lean to the latter. The number of bad titles taken, and the number of good causes lost by the errors of attorneys and solicitors is only known to Judges—hardly even sufficiently known to barristers. Every consideration, then, tends to show the extreme importance of sound and full legal education being accessible to this branch of the profession.

The great and useful body of men to whom we are referring have done themselves the greatest honour by the pains which they have of late years bestowed upon this subject. They, in truth, may almost be said to have begun the present movement (so to speak) in favour of Legal Education. The London University (now called University College) was first in the field, and established a law professorship about twenty years ago. Some few years after, the Law Society began a lectureship, which has been well attended by the articled clerks and the younger members of their body. We understand that much good has been done in consequence of this judicious proceeding.

There is a most fatal error in the plan of the Four Inns for establishing professorships. None but members of these Four Societies are allowed to attend the lectures so founded. Now this exclusion at once deprives the Institution, thus begun and thus restricted, of all pretensions to be regarded as a university. That students in all universities are matriculated, and that those only thus belonging to any university should profit by the instruction given within its precincts, is obvious and is undisputed. But if the being a member of the Inn, which presupposes a deposit of 100*l.* and a payment of some

pounds yearly, be a condition precedent to learning the law from its teachers, the public are excluded, and the public benefit from the new scheme is most materially obstructed. The greater part, indeed, of that benefit is intercepted. We therefore venture to hope that this step may be retraced in time, and the doors of the new school thrown open to all.

We have named the great body of solicitors and attorneys, and with just praise for one good work. Let us, as sincere friends of law amendment, also do them equal justice in that most extensive subject. We heartily subscribe to the panegyric bestowed upon them by the President of the Law Amendment Society, at its last general meeting. He truly observed, that, far from obstructing the efforts of the Society, those worthy and able men were its most valuable, zealous, and disinterested allies.

We shall conclude this article by extracting the resolutions of the Legal Education Committee which appear to us important.

“ 1. That the present state of Legal Education in England and Ireland, in reference to the classes professional and unprofessional concerned, to the extent and nature of the studies pursued, the time employed, and the facility with which instruction may be obtained, is extremely unsatisfactory and incomplete, and exhibits a striking contrast and inferiority to such education, provided as it is with ample means and a judicious system for their application, at present in operation in all the more civilised states of Europe and America.”

“ 3. That it may therefore be asserted, as a general fact to which there are very few exceptions, that the student, professional and unprofessional, is left almost solely to his own individual exertions, industry, and opportunities, and that no legal education, worthy of the name, of a public nature, is at this moment to be had in either country.”

“ 5. That this conviction is not less strong, when we come to a careful consideration of the results of the present want of legal education as they affect the student and society. The general student being without the means even of an elementary legal education as part of his general course in the university, proceeds to the active business of life, and the discharge of duties which a free country and popular constitution confide to him, very inadequately prepared for the purpose. He is called on to act as magistrate,

legislator, administrator, with insufficient knowledge, crude ideas, and false views. The professional man suffers still more. The Barrister has to obtain his knowledge by practice only, and must, more or less, however it may be useful as an instrument in acquiring immediate wealth, feel when called to a higher sphere of usefulness and duty in his profession, that technicalities will not supply the want of the spirit and wisdom which should regulate their use. The solicitor comes ill entitled, through want of the qualities which sound and careful education can best give, to that confidence and reliance which the very delicate and complicated nature of his duties demand. The minister or consul abroad has experience only to guide him, and in the many international questions which may arise, looks principally to precedent for guidance and support."

"6. That amongst other consequences of this want of scientific Legal Education, we are altogether deprived of a most important class, the Legists or Jurists of the Continent; men who, unembarrassed by the small practical interests of their profession, are enabled to apply themselves exclusively to law as to a science, and to claim by their writings and decisions the reverence of their profession, not in one country only, but in all where such laws are administered."

"9. That a system of Legal Education, to be of general advantage, must comprehend and meet the wants not only of the professional, but also of the unprofessional student."

"16. That this institution [i. e. a Law University] is to be sought rather in the application, if possible, of old establishments than the erection of new ones, from the guarantee which the former give of order, efficiency, and permanency; and that such institutions are, to a great degree, to be met with in the "Inns of Court" in both countries. In direct connection with the Bar, under the superintendence of its highest authorities, the Judges, or of its most distinguished members, the Benchers, with old prescription, ancient privileges, very large accommodations, ample funds, and venerable associations, immediately interested in the progress, and honourably jealous of the fame of the profession, no bodies could be more appropriately selected, if willing or likely to be more willing, when once they shall have entered upon the task, than the Inns of Court. No violent or inappropriate innovation is attempted to be forced upon them. They resort only to their own ancient statutes and practices, and resume anew the original objects of their institution."

The Twentieth Resolution would transplant the German system, of which some account has already been given in this Work, into our soil.

"20. That it would be advisable to begin with the great branches only of the Law, but highly desirable, as the system advanced, to add such other chairs as in the first instance the exigencies of the profession itself required, and, in the next, as might be of utility to the profession and to the public generally, such as chairs of international, colonial, constitutional law, medical jurisprudence, municipal, and administrative law, &c. &c. In this view also, and for the purpose of giving more extension, and at the same time more energy and efficiency to the plan, a system somewhat analogous to that in use in Germany might be adopted, namely, lectures might be given; some suited to the public at large, or "Public Lectures;" others appropriated to the special purposes of the profession, or "Private;" and others, again, limited to the more diligent and advanced pupils of the professor, or "Most Private;" and which last might advantageously be combined with attendance at the Special Pleader's or Conveyancer's office."

The Twenty-fourth Resolution would, indeed, make an innovation.

"24. That it would be highly advisable to substitute for attendance on Term Dinners in the several Inns, attendance on Term Lectures, the number and nature of which, and how far obligatory, and how far optional, to be determined by common consent and on an uniform plan; and that students in England and Ireland should be entitled to make use of certificates of such attendance, whether in the Inns here or in Ireland, as qualifying them (other conditions being also fulfilled), equally, for admission to the Bar."

We have on the present occasion no space for examining or making extracts from the evidence and appendix to this report. We shall, however, return to these, not only because much valuable information on the subject of legal education is there to be found, but because many opinions on the general state of the profession have also been given, which should be noticed.¹

¹ It should be stated that while this sheet was passing through the press, the Society of Lincoln's Inn has placed (on the 20th of July) a notice in its hall, stating the intention of the benchers to appoint a lecturer on equity in Michael-

ART. II. — RECOLLECTIONS OF A DECEASED WELSH JUDGE.

No. VII.

ON our circuit we have had brethren coming from the two sister kingdoms of Scotland and Ireland. Ferguson, since gone to India, where he is making, I hear, a large fortune, was of the former class, though he had never been at the Scotch Bar. But Ogle belonged to the latter country, and he too is now thriving in India.

Ferguson was an excellent fellow, full of talent, little read in his profession, owing, indeed, the reading he had to the accident of having been imprisoned under sentence for a seditious riot at the state trials at Maidstone, where he and Lord Thanet were charged with having aided in a rescue of the prisoners just acquitted, but detained on a new charge. Ferguson always spoke of this conviction with a bitterness foreign to his nature, as does Lord Thanet to this day; but Ferguson used to give us anecdotes of the Maidstone trial, which were amusing. Thus, Sheridan being called for the defendants, Garrow cross-examined him, and happening to dislike the answer he got, was using the ordinary form of palaver in repeating the question, "Perhaps I don't make myself understood?" "Certainly you do not," said Sheridan coolly enough. "Oh! then," and Garrow repeated his question in a different form; but still the desired answer came not; whereupon he said in the accustomed palavering manner — "It is perhaps my obscurity and confused way of putting it?" — Sheridan bowed assent in a marked manner, which excited loud laughter, as he added, "Exactly so." Abbott, now Chief Justice, was called for the Crown, and Erskine cross-

mas term next. We are glad of this; but we do not feel disposed to alter or qualify one word of what we have written, because, first, we think that the lukewarmness of this Inn has considerably delayed the completion of the whole scheme; and further, because much more remains to be done in the work of reformation.

examined him. Fugion, the Bow Street runner, had just been examined. Abbott gave a shuffling answer, which drew from Erskine the only harsh word, Ferguson said, he had ever heard from that great and mild-tempered man. "Sir, I should have been ashamed of the Bow Street runner if he had given me an answer like that." Abbott, Ferguson said, looked furious, and never forgot or forgave the blow.

The Irish Bar and Bench are, I believe, high in point of talent, and respectable in learning; but they have no powers of correctly doing their business. It is all a haphazard from what I have seen of them; but no one can deny them great readiness and eloquence; and their wit is renowned. But their wit is not confined to the Bar as it is with us, unless on very rare occasions—"few and far between." On the contrary, the Irish Bench, if not the fountain of wit, is, at least, one of its reservoirs; it is a main through which wit flows freely and copiously. I have heard of numberless instances, like the one I formerly recounted, of Sir Frederick Flood's "unfortunate client," which, by the way, I ascribed to Lord Chief Justice Downes; whereas it was Lord Guillemores (Chief Baron O'Grady's). With his strong Limerick brogue; his quickness of repartee; his unscrupulousness of offending against strict decorum; he really seems to have been among the most accomplished of jokemongers. His sarcasm was often so sly that it went over the head of his victim, but was perceived and relished by the by-standers. Thus, when one rather of a silly nature was complaining of his son's obstinacy, and calling that near relative a "complete mule." "No doubt" (said O'Grady) "he has a title to the name, both personal and hereditary." But his victim asked, "How could a mule beget a mule?" "No, truly," answered he, "but every mule must have a father." Macnally, a vulgar man, and therefore ever fond of keeping high company, was once showing off about his dinners at Leinster House, and would bring on the subject by affecting to complain of their plainness and scantiness. "How so?" said the Chief Baron. "Why," says Macnally, "for instance, yesterday we had no fish at table." "Probably," said my Lord, "they had eaten it all *in the parlour*;" so fine was

his wit. But in more broad jesting Chief Baron Patterson was at least his equal. He once addressed a Grand Jury on the state of the country, then disturbed by the cabals, intrigues, and squabbles of the great rival powers or families of Agar, Flood, and Bushe. "It is truly painful," said his Lordship, "to contemplate; but how can it be otherwise when the land is *flooded* with corruption, each man *eager* only for place, and every *bush* conceals a villain?"

Macnally was one of the greatest romancers ever known even in Ireland. I have heard men say that he had, by some awkward, not very sober or any very temperate scrapes, lost the whole of one thumb and a moiety of another finger, and they used to ask the *how* and the *when*, to each of which interrogatories he would put in a totally different answer; till at last, getting quite confused, and half-recollecting his former accounts of the matters in question, he got furious, and said he had wholly forgotten all about it.

Another time Macnally went to Mr. Parsons, one of the wits of the Bar, when his son, a somewhat disreputable character, had been robbed: "Well (said M.), have you heard of my son's robbery?" "No," answered Parsons quietly, "No, who has he been robbing?"

The learned and most able Chief Justice whom I have just named (Bushe) was kept many years Solicitor-General by the reluctance of Saurin to resign his Attorney-Generalship, and Downes his Chief Justiceship, both dreading to see a Whig succeed. One day, at the Lord Lieutenant's table, his Excellency fell to praising Downes as an able Judge, to which the Solicitor-General assented. He then spoke of his manners as a Judge and a gentleman — the same full assent. He then dwelt on his suavity of temper in all positions, public and private. To this Mr. Solicitor could only agree. Next his Excellency spoke of his great virtues as undeniable, and without any exception. Mr. Solicitor could not go quite so far. He said, "Why, yes, generally speaking; yet perhaps —" "Perhaps what?" said the wondering Viceroy. "What can be the exception to his virtuous character — his most pure character?" "There is one virtue in which he is deficient — I mean *resignation*." All mankind knew that he

had remained far too long on the Bench, and ought to have retired much earlier.

Downes and Burton both were Englishmen, and went over to Ireland, the latter when forty years old. Both began like many barristers formerly, and some in our day, by *noting briefs*, or helping by abstracts, the leaders in full practice. Downes was never married, but had, for the sake of society, living with him two maiden sisters of Hussy Burgh — aged ladies of extraordinary starchness and old fashion, the aunts of Sir Ulysses, on whom he got the title settled after him; for Sir Ulysses was in no way related to the Chief Justice, excepting through his two maiden aunts; if playing piquet or whist with his Lordship can be called relationship. I do not imagine such a descent or limitation of a title was ever known in any other country but the one where all irregular things are done. Of Downes, Curran always expressed the lowest opinion. I have heard him describe his mind as a quagmire; and say, moreover, that half of what passed before him in Court he could not hear, and much more than half of what he heard he could not comprehend. He had hardly any recommendation but a fine person and a most judicial aspect, which many scrupled not to call an *imposing* appearance, for it was calculated to make the spectator fancy he had some capacity, which he had not. His want of resignation was seen still more plainly when Plunkett was in office. Then Downes seemed screwed down to the Bench, as Curran said, “like a log.”

I place Plunkett very far above all the Irish and almost all the English speakers I have ever heard; and I have heard the best of both countries. But I never heard Plunkett at the Bar, where I consider he must have been very great indeed. His perfectly logical head — his sustained force of reasoning — his entire neglect, amounting to an apparent contempt of every thing but the matter in hand — the cause; his superiority to tinsel and all finery, like a kind of abhorrence — even without his own most chaste imagery, most apposite comparisons, happy illustrations, and occasionally, but very rarely, admirable jokes — these perfections place him in the very first line of orators among those of all ages; and

these perfections are in a most peculiar manner suited to command the greatest success at the Bar, whether before the Court or the jury. Of his wit, sometimes approaching to drollery, and the effect heightened by its contrast with the peculiarly grave aspect and manner of the man, I have seen both in Parliament and society instances not very easy to repeat with success, because depending much on the circumstances and the humour of the person at the moment. There was, however, one quality that always marked them — they had something inexpressibly odd and wholly unexpected, and they came very easily into play. I remember once on a legal question in Parliament, he was speaking of the *Bastard eigne* and *mulier puisne*; he said, “the child after marriage, whom the law in its wisdom is pleased to call the *mulier*, and might as well have called the *ostrich*.” I never saw the lawyers present more merry, except perhaps when Windham in his admirable and unreported speech on the Walcheren inquiry, said, “Talk of a *coup de main* in the Scheldt! You might as well talk of a *coup de main* in the Court of Chancery!” At that moment the Master of the Rolls (Sir William Grant) entered, and took his seat, looking as grave as usual. But the gravity lasted not long; the shot told on him, and he rolled about on his bench almost convulsed with laughter. The speech was unreported, because Windham had offended the gentlemen of the press, whom a Judge once called our Lord the King of the Press. He had on a recent occasion of some complaint about misreporting, dared to say that he only wished they would let him alone and not report him at all. They took him at his word during the greater part of the session.

But to return from my ramble, alas, the only one I can now enjoy since our Welsh tours of little work and much play have been abolished. I remember once when some one said that he had seen a brother of Leach’s (the Vice-Chancellor), and that his way of speaking and his whole ways, were so like those of his Honour, that the manner seemed to run in the family; Plunkett, who was present, said, “I should have just as soon expected to see a wooden leg run in a family.” It was this perfect appropriateness,

and at the same time perfect unexpectedness, that gave such point to his jests, as well as to his more severe illustrations. Natural without being obvious, the description somewhere given of fine writing, peculiarly applies to him; so does that other description, right words in right places, apply to his style, which is quite perfect.

I forget whether it was Plunkett or Grattan, who said of Lord Clare, the famous Chancellor, that he was a dangerous man to run away from. But I have often recollected the sentiment as well as the phrase, and thought how much it applied to the Irish men of loud valour. Lord Clare, formerly Fitz-Gibbon, was a very able man and a good and even powerful advocate, but little of a lawyer. As a minister in difficult times he showed great firmness and vigour. I remember Grattan (who had fought a duel with him) thus spoke in his usual picturesque language and yet drawling tones: — "Clare was an honest man, but no friend to Ireland. Foster was a knave, but he would do a job for Ireland!" and one plainly saw that Grattan, from love of Ireland, preferred the knave to the honest man.

Grattan was, we all know, full ready to "go out," as it is technically termed, in Ireland especially; so the Government of the day once deemed it advisable to have "a man" ready for him. A bullying ruffianly fellow was accordingly, in that *virtuous* Administration, brought into Parliament; and all men were aware that his mission was not so much to represent the people as to "*take off*" the people's favourite. He made an offensive bravo kind of speech, saying, "Whichever way he turned his eyes, — to the north, to the east, to the west, to the south, — he viewed with alarm the consequences of Mr. G.'s deeds." "Ay," answered Grattan, "the member has looked all around him, and to the north, east, west, and south, and with alarm. Perhaps he saw in the course of his survey the gallows!"

ART. III. — THE LAW OF ESTATES.

CHAP. VI. — ESTATES FOR YEARS.¹

WE have hitherto treated of estates of freehold, as to which we have in the first place laid down some general rules and distinctions, and then described the various estates which are so denominated. We now come to a species of estate, which, although in the “eye of the law” inferior even to the lowest estate of freehold, is, in many cases, of far greater value, and is, in fact, more employed in modern conveyancing than any other: we mean an

ESTATE FOR YEARS.

It is to be observed, that the estates which we have considered in the preceding chapters of this treatise are those which subsisted during the feudal era, and were recognised by the system of law then in force. But it will be seen that many of the rules which we have laid down respecting them are of an arbitrary nature. They depend on many nice and subtle principles. Estates in fee-simple, estates tail and for life, and those estates which the law creates in favour of the husband and wife in the form of curtesy and dower (although the latter has been grossly evaded), are all pretty much the limitations which are desired as affecting immovable property. But at common law they could not be always limited, so as to effectuate the wishes of the parties. Many technical rules, belonging to the feudal system, prevented this; and it was found convenient to evade these rules as the transfer of land became more frequent, and it became the subject of mortgage, settlements, and other familiar dealings. The estate for years may be said to have been left out of the feudal system. It was not affected by its rules, and on this very account it was seized upon first by the ecclesiastics, the earliest conveyancers, and subsequently

¹ See preceding Chaps. *antè* p. 33. and references.

by more modern practitioners, to effect the objects for which property in land becomes most valuable.

This estate, if viewed at the common law, was indeed a weak and uncertain holding, as to which disfavour if not suspicion attached¹, and which had from time to time to be protected by statute from being defeated altogether. But although this was so in the time of Littleton, and even of Lord Coke, the estate for years gradually became and has continued of great service, having been found far more flexible than any estate of freehold; and thus in mortgages and settlements it was and is extensively used.

All the subjects of real property, which are generally alienable, may, by creating an estate for years in them, be rendered personal; and where a freehold estate is limited after an estate for years, the freehold is not said to be expectant upon, but subject to, the term²; and the possession of the termor, or owner of the term, is deemed the possession of the freeholder to whose freehold it is subject. It would, indeed, at first sight appear, that an estate for years is not the subject of tenure at all, but that, like all personal chattels, it is allodial³ in its nature: but this is not so; as Littleton⁴ expressly says, that if a lease be made to a man for a term of years, that the lessee shall do fealty to the lessor, because he holdeth of him. But tenant for years has no *seisin* of the lands, and thus his estate required neither livery of seisin, nor any technical words or ceremonies, for the purpose of transferring it: it was always liable to the debts of its owner as well after his death as in his lifetime; it could be disposed of by will, a power rigorously refused by the feudal system to any owner of a freehold estate down to the end of the reign of Henry VIII.; it could also be made to commence *in futuro*, whereas, as we have seen, no freehold estate could be so limited at common law. It was, in fact, susceptible in many other respects of uses and adaptations from which all freehold estates were carefully excluded by the policy of the law.

Chattels and freeholds may have, either of them, the rela-

¹ Co. Litt. 46 a. cited *post*, 352.

² See as to this, chap. I. 4 L. R. 36.

³ Burt. Comp. (893.)

⁴ a. 132.

tions of particular estates and remainders; but when the freehold is preceded by a chattel only, the freehold is a *present* interest, not if it be a remainder, in power of alienation only, nor if it be a reversion only, merely in power of alienation and right of seignory, but in most of the circumstances and incidents of title.¹

And thus, of however little value these terms were originally, they have been gradually favoured by the legislature. They give the substantial usufruct of the land; and the owner, although subject to probate and legacy duty, is now intrusted with the parliamentary² and municipal franchise³, and has an estate, in proportion to its duration, little inferior in value, if free from charges and without impeachment of waste, to an estate in fee simple.⁴ It is only to be regretted that much of the law on this subject, although practically useful, is altogether founded on an evasion of the rules of common law, and is, in some parts, absurd; as where it treats a term of 1000 years as less than the smallest freehold estate in the same lands.

Having made these few general observations, we shall now consider, *first*, What an estate for years is; *secondly*, How it may be acquired; *thirdly*, How it may be held and enjoyed; and *fourthly*, How it may be assigned or lost. And,

I. What an Estate for Years is.

"Tenant for term of years," says Littleton, "is where a man letteth lands or tenements to another for term of certain years, after the number of years that is accorded between the lessor and the lessee; and when the lessee entereth by force of the lease, then is he tenant for term of years."⁵

¹ Burt. Comp. (833.). This is as old as Bracton's time, who says, that if a person first creates a term, and afterwards enfeoffs another of the same tenement with livery of seisin, both estates shall stand. Lib. 2. c. 18. s. 7.

² 2 W. 4. c. 45. s. 20. The original term must not be for less than sixty years, and the land of the yearly value of 10*l.*; or not less than 20 years, and the land of the yearly value of 50*l.*; or the leaseholder must occupy as tenant at a rent of not less than 50*l.*

³ The corporate body now includes all male persons of full age who have occupied houses and shops rated for three years to the relief of the poor.

⁴ Burt. Comp. (833.).

⁵ Litt. s. 58. A very late writer is incorrect when he says, "An estate for years is a contract between a lessor and a lessee, for the possession and profit of

This definition points rather to a beneficial lease on which a rent is reserved, and which rarely exceeds ninety-nine years; but there are also long terms of years, of 500 or 1000 years, created most commonly on the mortgage or settlement of the land, for the purpose of securing or raising money.

Beneficial leases are frequently made for seven, fourteen, and twenty-one years, and usually at a rack rent (that is, a rent at the full value of the premises), and terminable at the option of the parties, or of one of them. Leases are also frequently made for building purposes, reserving a small ground-rent; and when the house is completed, an interest in it, for a considerable period, is sold for a sum of money, and here usually a ground-rent is also reserved.

A year is the shortest period recognised by the law, and if the lease is made but for half a year, or a quarter, or even a less term, the lessee is considered as a tenant for years, and is so styled in some legal proceedings.¹

We do not intend to allude particularly to the numerous rules as to *leases*, except as they throw light on the nature of the *estate* of the tenant for years.

"In the eye of the law," says Lord Coke², "any estate for life, being an estate of freehold, is a higher and greater estate than a lease for years, though it be for a thousand and more, which *never are without suspicion of fraud*; and they were the less valuable, for that at the common law they were subject unto, and under the power of, the tenant of the freehold." When Littleton wrote, if a man had made a lease for years by writing, and he that had the freehold had suffered himself to be impleaded in a real action, by collusion, to bar the lessee of his term, and made default, &c. the Statute of Gloucester gave the lessee for years some remedy in certain cases; and afterwards the stat. 21 Hen. 8. gave remedy in all cases, saving the case of a guardian, and gave them power to falsify all manner of recoveries had against the tenants of the freehold upon feigned and untrue titles, &c.³

lands, for a certain period on the one side and a recompense by rent or other return on the other." 2 Crabb's Convey. 224. This applies only to a beneficial lease.

¹ Litt. s. 67.; Co. Litt. 54 b.

² Co. Litt. 46 a.

³ Ibid.

An estate for years is also called a term, because the period of its duration is absolutely defined ; all the other estates are of uncertain duration ; but an estate for years, after the time of its commencement can be ascertained, must be certain as to the time at which it will end¹ ; and Blackstone remarks, that a term of years is considered in law as a chattel interest, being an interest issuing out of a real estate, of which it has one quality, immobility, which denominates it real, but wants the other, a sufficient legal indeterminate duration.²

This is not, however, true in every case. Thus, if a lease is made for twenty-one years if J. S. live so long, this is a good lease for years, and yet its termination is uncertain.³ A lease for fourteen or seven years is valid, and the ambiguity is to be removed at the option of the lessee.⁴

But, as a general rule, in every lease for years the term must have a certain beginning and a certain end, and herewith agreeth Bracton—"terminus annorum certus debet esse et determinatus." And all that is meant by this is, that the year must be certain when the lease is to take effect in interest or possession ; for before it takes effect in possession or interest it may depend upon an uncertainty, viz. upon a possible contingency before it begin in possession or interest, or upon a limitation or condition subsequent.

Albeit, says Lord Coke, there appears no certainty of years in the lease, yet if by reference to a certainty it be made certain, it sufficeth, quia id certum est quod certum reddi potest. Thus, if a man make a lease to J. S. for so many years as J. H. shall name, this at the beginning is uncertain ; but when J. H. hath named the years, then it is a good lease for so many years.⁵

The word *term*, when applied to this description of estate, signifies the estate itself, which is conferred, and not merely the period specified in the instrument creating the term ; and therefore the *term* may expire during the continuance of the time, as by surrender, forfeiture, and the like. For which reason, if I grant a lease to A. for the term of three years,

¹ Prest. Est. 607.

² 2 Bla. Com. 386.

³ Co. Litt. 45 b.

⁴ Doe v. Dixon, 9 East. 15.

⁵ Co. Litt. 45 b.

and after the expiration of the term to B. for six years, and A. surrenders or forfeits his lease at the end of one year, B.'s interest shall immediately take effect; but if the remainder had been to B. from and after the expiration of the said *three years*, or from and after the expiration of the said term, in this case B.'s interest will not commence till the term is fully elapsed, whatever may become of his term.¹

II. We now proceed to inquire, *How an estate for years may be acquired.*

It is understood, says Littleton, that in a lease for years by deed, or *without deed*, there needs no livery of seisin, but he may enter when he will by force of the same lease. But most leases must now be not only in writing, but by deed; for by s. 1. of the stat. 29 Car. 2. c. 3., all leases, estates, terms of years of any lands not put in writing and signed by the parties making the same or their agents, shall have the force and effect of leases or estates at will only (excepting leases for three years at rack rent); and by stat. 8 & 9 Vict. c. 106. s. 3., a lease required by law to be in writing of any tenement or hereditament, shall be void unless made by *deed*.

The usual words in creating a lease for years are "grant," "demise," and "to farm let;" but "demise" is alone quite sufficient; and any words which show the intent of the parties that the one shall divest himself of the possession, and the other come to it for a determinate time, will be enough.² The word "demise" implies an absolute covenant on the part of the lessor for the lessee's quiet enjoyment during the term, which, however, may be, and usually is, qualified by a more limited express covenant.³ The word "grant" has no longer any operation of this nature except in cases where by any Act of Parliament, it is or shall be declared that the word "grant" shall have this effect.⁴

An estate for years may be made to commence *in futuro*, although it is otherwise of an estate of freehold; and thus, as

¹ Co. Litt. 45 b.; 2 Bla. Com. 144. ² 4 Bac. Abr. 160.

³ Ibid. 65.

⁴ 8 & 9 Vict. c. 106. s. 6. In some acts the word "grant, bargain, sell," are made to have the effect of the usual covenants for title in favour of a purchaser. 6 Ann. c. 35. s. 30. & 34.; 8 G. 2. c. 6. s. 35.

we have already observed, if this first estate was not favoured by the rules of the feudal system, it also escaped some of the inconvenience attending its rules.¹

An estate for years may be created by lease, but when the owner has the freehold it may be also created by any assurance used for conveying a freehold estate, as grant, lease and release, &c., or it may be created by devise.

A point connected with this estate, which led to many subtle and useless distinctions, was that of entry by the termor. Littleton, as we have seen, says that when he entereth *then* is he tenant for years; and Lord Coke² continues, "true it is that to many purposes he is not tenant for years until he enter, as a release made to him is not good to increase his estate before entry; nor can the lessor grant away the reversion before entry."³ And this rule was of some importance when the lease and release was the great assurance of the country, which it was for nearly 200 years, although now being fast superseded by the statutory grant, as we shall hereafter see when we explain the nature of that assurance.

But the lessee before entry hath an interest *interesse termini* grantable to another, and passing on his death to his representative.⁴ And the entry may be made at any time during the term, albeit the lessor die before the lessee enters.⁵

We have hitherto been speaking of a term of years at common law, because, when this estate is created by an instrument taking effect under the Statute of Uses, the possession is transferred by the operation of that statute, and no entry is necessary.⁶

This point of entry would be much more important in practice, if the *interesse termini* could not be assigned over; but this being so, even if a stranger enter by wrong, such grant will transfer the lessee's power of entry and right of re-

¹ 5 Co. 94.

² Co. Litt. 46 b.

³ He cannot maintain an action of trespass for an injury to the land before entry. See *Williams v. Bosanquet*, 1 Brod. & B. 248.; *Edge v. Stafford*, 1 Tyr. 302.

⁴ Litt s. 319; Co. Litt. 46 b

⁵ Co. Litt. 46 b. 51 b.; Litt. s. 66.

⁶ *Lutwich v. Mitton*, Cro. Jac. 604.; Cro. Car. 110.

ducing the estate into possession. For till the entry of the lessor the estate is not executed, but remains in the same plight as it was when the lease was made; so that no intermediate act, either of the lessor or a stranger, can divert or disturb it; because, whoever comes into possession, whether by right or wrong, takes it subject to such future charge, which the lessee may exact whenever he thinks fit, as by a title prior and paramount to all such intermediate violations of the possession.¹

If, however, a person entitled to an estate for years, to commence *in futuro*, once entered and was put out of possession, he could not afterwards grant over his term to a stranger; for by his entry the estate for years was actually executed, and being after that defeated by the entry of a stranger, the lessee had only a right of entry left in him, while the policy of the law would not suffer him to transfer over to a stranger only as a right of action; but now, by stat. 8 & 9 Vict. c. 106. s. 6., a right of entry, whether immediate or future, and whether vested or contingent into or upon any tenement or hereditaments in England, of any tenure, may be disposed of by deed.²

A term vests in the executors and administrators of the person last possessed of it, without any *exparte* limitation, like any other personal estate; and their succession to a chattel cannot be altered or controuled by any limitation of the party. But the king, by his prerogative, may take a chattel in succession; and accordingly, a lease for years made to him and his successors is good, and shall go accordingly. If a lease for years be made to a bishop and his successors, his executors and administrators shall have it in *autre droit*; for, regularly, no chattel can go in succession in a case of a sole corporation, no more than if a lease be made to a man and his heirs it can go to his heirs.³ If a chattel real is bequeathed to any person by the will, it passes to him without any assignment, by the mere signification of the executor's assent; after which, if the possession be withheld, the legatee has his remedy by

¹ 1 Bac. Ab. Leases, M.; 1 Cru. Dig. 241.; *Wheeler v. Thoroughgood*, Cro. Eliz. 127.; 1 Leon. 118.

² Cro. Eliz. 15.; 5 Co. 124 a.

³ Co. Litt. 46 b.

ejectment.¹ And it seems to be immaterial whether the chattel be particularly named in the will or included in a general residuary bequest.²

There is no particular form in which the executor ought to signify his assent to a bequest or legacy; he may do so either by act or word.³ But if he be himself the legatee of a chattel interest, subject to a further executory bequest of it to another person, his own entry upon the land will not of itself be construed as an assent; for he cannot assent to both dispositions, if he do so to either, and it might be inconvenient to him to be thus deprived of his official power over the property by an ambiguous and perhaps necessary act.⁴

A will bequeathing leaseholds⁵ must now be in writing, signed at the end thereof by the testator, or by some person in his presence, and by his direction, and such signature shall be made by the testator in the presence of two or more credible witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator; but no form of attestation shall be necessary.

It should also be remembered, that no will, whether of personalty or of realty, made by a person under twenty-one years of age, on or since the 1st of January, 1838, is valid.⁶

Previous to the last Will Act, a well known distinction existed as to the operation of a will on freeholds and leaseholds. In the former it did not operate on any land of which the testator was not seised at the time at which he made his will; but as to the latter, the will spoke from the death of the testator. There is now no distinction of this kind.⁷

Another important distinction as to the operation of a will on real and personal estates still remains. In a devise of lands, the lands pass to the devisee at once, and the will operates as a conveyance, but all the personal estate of the testator vests in the executor, who has an absolute power of disposal over it.⁸

When there are several executors, who all prove the will,

¹ Doe v. Guy, 9 East, 120. ² 5 Ves. 581. ³ Burt. Comp. (945.).

⁴ 1 Doe v. Sturges, 7 Taunt. 217. ⁵ 1 Vict. c. 26. s. 9.

⁶ 1 Vict. c. 26. s. 7. ⁷ 1 Vict. c. 26. s. 3.

⁸ 2 Wms. on Exors. 609.

they have a joint and several interest in all the goods and chattels of the testator; therefore, a disposition by one of them only of a term for years is good. But one administrator cannot convey an interest so as to bind the other.¹

An executor may assign a term before he has proved the will; but if the will be afterwards proved in the wrong court, it will have no effect on the term.²

A purchaser assign term of years from an executor is not bound to see to the application of the purchase money, even though the term be charged with the payment of a particular debt, or be specifically bequeathed, because terms for years are subject to the payment of all debts in the first instance.³

A term of years belonging to a wife, being personal estate, vests in the husband, and he may dispose of it in his lifetime as he pleases, but he cannot deprive his wife of her right of survivorship by bequeathing it⁴, which well established rule does not seem to rest on very satisfactory grounds.

Estates for years pass from executor to executor *in infinitum*; but when the course of representation from executor to executor is interrupted by one administration, it then becomes necessary for the ordinary to commit administration afresh of the goods of the person who was last possessed of the term in his own right, nor administered by the former executor.⁵ A limited or special administration only may also be granted, viz. of certain specific effects; and it was a common practice, before the late Terms Act⁶ to obtain a special administration of a term of years.

III. *How an Estate may be held or enjoyed.* By the ancient law of England it is said, "a man could not have a lease above forty years at the most; for then it was said that by long leases many were prejudiced, and many times men disinherited; but that ancient law is antiquated."⁷ And there seems some doubt whether it ever existed, as Blackstone⁸ has cited, from Madox's Collection of ancient instruments, in his *Formulare Anglicanum* several instances of leases

¹ Dy. 23 b.; Eq. Ab. 319.; 1 Atk. 460.; 1 Cru. Dig. 243.

² 1 Wentw. Ex. 34.

³ Ewen v. Corbett, 2 P. Wms. 148

⁴ Pop. 5.; Co. Litt. 351.

⁵ 2 Bla. Com. 506.; 11 Vin. Ab. 107.

⁶ 8 & 9 Vict. c. 112.

⁷ Co. Litt. 45 b.

⁸ 2 Bla. Com. 142.

for a longer time as early as the reign of Richard II.; and Mr. Spence¹ observes that Bracton mentions long terms of years, and that it is evident from the statutes *De Religiosis*, 7 Edw. I., that such terms were created at this time as one of the contrivances to evade the statutes of mortmain.

A tenant for years has incident to his estate the same estovers to which tenants for life are entitled². But of course this right may be varied by special agreement. There is some difference with respect to emblements between a tenant for life and a tenant for years. The rule as to them is, that only those are entitled to emblements who have an uncertain estate in the land, which is determined either by the act of God or the law, between the period of sowing and the severance of the crop; but when there is a tenancy terminating at a particular period, which is usually the case with leases for years, and where the tenancy is determined by the act of the tenant, the tenant takes no emblements³.

And where the estate of the lessee, being uncertain, is defeasible by a right paramount⁴, or if the lease determine by the act of the lessee as by forfeiture, condition, &c., then he that has the right paramount, or that entereth for any forfeiture, &c., shall have the corn.⁵

A tenant for years is not only punishable for cutting down timber trees or committing any other kind of waste, but he is also punishable for permissive waste, and is therefore bound to keep all houses and other buildings upon the land in proper and tenantable repair.⁶

Where the clause "without impeachment of waste" is inserted in a lease for years, it will have the same effect as where it is inserted in the conveyance of an estate for life⁷; and the Court of Chancery will, in general, restrain the import of it in the same manner. Thus, a tenant for years, though without impeachment of waste, will not be allowed

¹ 1 Eq. Jur. 146.

² As to which, see *antè*, and Co. Litt. 41 b.

³ *Bulwer v. Bulwer*, 2 B. & A. 470.; Co. Litt. p. 56 a.

⁴ Co. Litt. 56 a.

⁵ Co. Litt. 55 b.

⁶ Litt. s. 71.; Co. Litt. 57 a.; 1 Cru. Dig. 245.

⁷ See 5 L. R. 38

to dig and carry away the soil for the purpose of making bricks.¹

A person is not said to be *seised* of an estate for years, but to be *possessed*; and we shall hereafter see, when we come to treat of the statute of Uses, how important this distinction became as applied to the construction of that statute.

IV. *We shall next see how a term may be assigned or lost.* An estate for years may be assigned; but in this estate the law allows an express restraint upon alienation²; which, we have seen in some estates, is held to be against the policy of the law.³ If the whole of the term is given or disposed of to another, it is called an assignment; but if only a part of the term, the reversion remaining in the lessor, this is called an underlease.

The restriction on alienation is not favoured even in limitations of terms of years; for if the limitation is to a lessee and *his assigns*, the condition is void, as contradictory⁴; and when a lease for years was made with condition that neither the lessee nor his assigns should alien, and the lessor afterwards gave his licence to the lessee to assign the estate, it was held that this dispensation entirely removed the restriction, and exempted the estate from the imposed forfeiture on any future alienation by the assignee.⁵ The neglect, however, of the lessor to avail himself of the forfeiture by entry, and his subsequent acceptance of rent will not have this effect, but amount simply to a confirmation of the first alienation.⁶

If the termor attempt to create a greater estate than he lawfully can, whereby the remainder or reversion is divested, it will operate as a forfeiture of his estate⁷; but it seems doubtful whether any assurance now in use would have this effect.⁸

¹ Bp. of London v. Webb, 1 P. Wms. 527.

² Doct. & Stud. 27.; Dial. 1. ch. 8.

³ See *antè*, chap. 1.; 4 L. R. 44.

⁴ Mo. 881. Hob. 170. Cro. Jac. 460.

⁵ Dumpor's case, 4 Co. 119.; see Doe v. Smith, 5 Taunt. 795.

⁶ Doe v. Bliss, 4 Trumb. 735.

⁷ Co. Litt. 251 b,

⁸ See 8 & 9 Vict. c. 106. s. 4.

When a term for years is assigned to another for life, at common law, he becomes entitled to the whole term whatever may be its length. But this rule of law is not followed by courts of equity. When it is wished therefore to give a life estate in a term, it is usual to vest it in a trustee *in trust* for A. for life, and after his decease in trust for B. This is a trust which a court of equity will enforce: the statute of Uses has no operation on an existing term, although a term created out of a freehold estate will be executed by that statute. And by will an estate in remainder may in effect be created by way of executory bequest, which will be valid at common law. Thus, if a term of years be bequeathed to A. for life, and after his decease to B., the whole term will be vested in A. for life, and B. will only have a *possibility*. This possibility can be bequeathed, and may be assigned in equity, and is now assignable at law.¹

Where land is given to one for life, renewable to him for twenty-one years, he has both estates in him so distinctly, that he may grant away either of them, for a greater estate may uphold a lesser, but not *e converso*, and therefore if a man make a lease to one for twenty-one years, renewable to him for term of his life, the lease for years is drowned or merged², for it was a maxim that *terminus et feudum non possunt constare simul in unâ eademque personâ*, and therefore an estate for years may merge in an estate for the life of the party or the life of any other person, or in an estate tail, or in an estate in fee; and in those instances in which an estate for years merges all collateral qualities annexed to that estate as to be dispunishable for waste, will be extinguished, and the privileges arising from those qualities will not belong to the estate in which the term of years is absorbed.³ But an estate of freehold cannot merge in an estate for years, although one estate for years may merge in another term of years; and as in the eye of the law all terms for years are equal, although the term in reversion is of less duration than the term in possession, merger will take place. Thus, a term

¹ 7 & 8 Vict. c. 76. s. 5.; 8 & 9 Vict. c. 106. s. 6.

² Co. Litt. 54 b

³ Lewis Bowle's case, 11 Co. 83.

of 1000 years may merge in a term of one year.¹ Whether if the second term be a *remainder*, the merger will take place is somewhat doubtful.²

Estates for years may be so settled as to answer the purposes of an entail.³

Another mode of terminating an estate for years, is by a surrender, which is either in fact or in law. A surrender in deed is by express words. A surrender in law consists in the acceptance from the reversioner of a new lease for any term whatever, to commence at any time before the expiration of the old one; in which case it cannot properly be said that the previous term is merged in the reversion, unless the commencement of the new lease be immediate; but the implied surrender must be referred to the supposed inconsistency of retaining the former estate and accepting another, which is in part concurrent with it.⁴ But where the new lease is made by a tenant for life of the reversion, and intended to take effect by virtue of a power of appointment extending beyond his life, it shall not if this power be ill executed take effect out of the lessor's own interest, but shall be absolutely void in order that the old lease may continue.⁵ On the other hand, an agreement for a new lease not amounting to an actual demise, may yet, if followed by a corresponding change in the mode of occupation, constitute such a tenancy at will as must imply a relinquishment of the pre-existing interest.⁶ A mere *interesse termini* can neither promote nor hinder the merger of any estate, nor can itself, properly speaking, be surrendered⁷; but it may be extinguished by surrender in law, or by assignment, or release.⁸

An estate of freehold cannot be made at common law to cease by the direction of the parties, but must be taken from the grantee by means somewhat similar to those by which it was given to him; yet it is otherwise in the case of an estate

¹ Hughes v. Robotham, Cro. Eliz. 308.; Stevens v. Bridges, 6 Mad. 66.;

² Bla. by Stewart, 213. ed. 3.

³ 4 Bac. Ab. 211, 212.

⁴ See *ante*, Ch. 2. 4 L. R. 282.

⁵ Bac. Ab. 212.; Burt. Comp. (751.)

⁶ Roe v. Abp. of York, 6 East, 86.

⁷ Hamerton v. Stead, 3 B. & C. 478.

⁸ Plowd. 198. Doe v. Walker, 5 B. & C. 111.

⁹ Co. Litt. 338 a; Burt. Comp. (907.)

for years, as that may be made to cease by a proviso in the conveyance itself upon the performance of any particular act. Thus, it has been usual when a long term of years is created, to insert a proviso that when the trusts of the term are satisfied the term shall cease.¹

These terms have, however, been dealt with by the law in a peculiar way.

It cannot be doubted that they were first employed and made use of as the only mode under the rules of the feudal system, of rendering land capable of answering the wants of parties dealing with it; but after they had thus served the purposes for which they were created, great difficulty arose in knowing how to dispose of them. The intention of all settlements and most mortgages is to leave the owner of the freehold to which the term is subject in the enjoyment of the lands until the time arrives for the payment of the money secured. Then, but no sooner, if this money is not paid, the person in whom the term is vested, usually a trustee, may enter upon the lands and receive the rents and profits, or he may raise the money by a mortgage of the term.

While the money is unpaid the term is called a term *in gross*; and when it is paid, the object for which it was created having ceased, the term becomes *satisfied*, and should naturally cease also²; but this is not so by our law. At law the term still remains a term *in gross*; but equity has built up a curious system for rendering these terms *attendant on the inheritance*. This doctrine does not always apply; for, 1st, — when the objects for which the term was created are accomplished, it may be expressly declared that, as we have seen, the term shall cease; and, 2dly, — the term may be merged in the freehold.³ But if there was not an end of the term in either of these ways, then it was until recently the practice to assign the term to a trustee as a protection against all incumbrances created since the creation of the term, and to attend the inheritance. The reasons for and against this practice have been recently given in this work⁴, and the legislature has now put an end to it by stat. 8 & 9 Vict.

¹ Co. Litt. 214 b.; 1 Cru. Dig. 242.

² See 3 L. R. 183.

³ As to Merger, see *ante*, p. 261.

⁴ 3 L. R. 183 — 190.

c. 112., by force of which every *satisfied* term which on the 31st of December, 1845, either by express declaration or construction of law, was attendant on the inheritance, absolutely ceased; so has every term which has been *satisfied* since that day, and which either by express declaration or construction of law has since that day become attendant on the inheritance; and so will cease every term which shall hereafter be satisfied, and so become attendant on the inheritance. With this only exception, that every term which was so attendant by express declaration on the 31st of December, 1845, is to afford to every person the same protection against every incumbrance, charge, estate, right, action, suit, claim and demand as it would have afforded him had it continued to subsist, but had not been assigned or dealt with after the 31st December, 1845.¹ "Such," says Sir E. Sugden², whose version of this important act we have adopted, "is the power of an act of parliament, that although such a term has absolutely ceased, yet it is to be deemed for those purposes as a subsisting term." A court of law in the construction of this act will inquire whether a party, who has had the term assigned for his benefit wants its protection, and if not, will hold the term has ceased.³

It should be noticed that a satisfied term might not only become attendant by being assigned to others or by express declaration, but might and may still become so as is alluded to in the act "by construction of law," or by implication. Thus, as a general rule, whenever a term would merge in the inheritance, if united, it shall attend if in a different person, without an express declaration by implication of law founded on the statute of frauds.⁴

A term for years attendant on the inheritance, whether by express declaration or by implication, was governed by the same rules as the inheritance itself is subject to.⁵

¹ Sug. V. & P. 777. ed. 11.

⁴ Sug. V. & P. 786. ed. 11.

² Ib. 96.

⁵ Ib. 790.

³ Doe v. Price, 11 Jur. 131.

**ART. IV.—ON THE ADMINISTRATION OF OATHS
IN COURTS OF JUSTICE.**

CONSIDERABLE interest was excited some years ago on the subject of the numerous oaths required by law. A committee of the House of Lords was appointed in the session of 1834 to consider the propriety of substituting a declaration for an oath in certain cases. Its result was the passing of the act 5 & 6 Vict. c. 62., which gave powers to substitute declarations for oaths in a great number of cases, but did not affect the administration of oaths in courts of justice. About the same time appeared Mr. Tyler's treatise on oaths, a work containing, in addition to a great quantity of very valuable information, many admirable observations on the latter subject, which have yet produced no practical result. No change whatever has been effected in the practice of administering judicial oaths; no effort has been made to remedy the glaring evils there complained of, much less to establish the true principle. To draw attention to the evils which arise from the present system, to point out the fundamental error on which it rests, and the true principle on which reform ought to be attempted, is the object of the following pages.

Few persons can have attended a trial at the assizes for the first time without being offended at the off-hand, matter of course kind of way in which oath after oath is administered by a very inferior officer, and still more by the perpetual recurrence of such expressions as "Now, sir, you are upon your oath, mind," "Do you mean to tell me upon your oath, sir," in the mouth of advocates cross-examining hostile witnesses. But the disgust which is thus occasioned is a very small part of the evil arising from the practice. It tends to taint religion with superstition, and to do serious injury to morality. That the present practice is highly mischievous the above-mentioned committee admitted, and recognised the

necessity for some reform; and Mr. Tyler, throughout his book, insists upon such a reform as of the very greatest importance. But, on examination, it will be seen that the committee have totally failed to point out the real source of the evil¹, and that Mr. Tyler, though in the passage quoted below he lays down the true principle, does not carry it out in a satisfactory manner. To do this is the object of the following observations; and for this purpose it is proposed, in the first place, to inquire what is the real meaning, and what the real obligation of an oath, and to ascertain in what sense the administration of oaths is compatible with the highest interests of morality and religion; and, secondly, by the results so obtained, to examine our present system, and to suggest some alterations.

First, then, what is an oath? All the definitions given by Mr. Tyler (pp. 243—246.²), both ancient and modern, agree in stating an oath to be some act of the person whose assertion it is to corroborate. Some of them consider this act to be an imprecation of the Divine vengeance on the swearer if he says what is false; others, that it is simply a recognition by the swearer that he is speaking in the presence of God. If, however, we examine the different oaths used by different nations and people under different circumstances, we shall find that the feelings which must be supposed to exist in the mind of the swearer are very various, and sometimes very complicated. According as that which is sworn by is an object of value, of respect, of fear, or of love, the nature of these feelings will differ.

When the Jew swears by the name of Jehovah, he believes that a jealous God will avenge himself on one who takes his name in vain. When the miser swears by his gold, or the warrior by his sword, we may conceive their feeling to have been, “May I lose this, the thing in all the world which I

¹ It must moreover be admitted, that the opinions of the persons examined by the committee are not generally favourable to the view taken in this article. There is one exception that of Mr. Wedgwood, who must, from his position, have been most capable of judging of the effect of the present system, and who has since given the best proof of the importance which he attached to his opinion.

² The second edition is the one referred to throughout.

prize most highly, if I do not speak the truth." Demosthenes swore by the patriots of Marathon, when Pythagoras invoked the elements, their meaning probably was, "If I am telling an untruth, I am unworthy to revere these things any longer; I am unworthy to have any thing to do with them." It is quite as unnecessary in the latter instances to infer with Mr. Tyler (p. 143. *et seq.*) that all these things were regarded by the swearer as personal divinities, as to make any such inference in the case of a man speaking under the influence of strong passion, who strengthens his assertions by such phrases as, "By my hopes of happiness," "By my love for you." It is not, as Mr. Tyler here suggests, in substituting some idol or inferior creature for God as the object of invocation that the real danger and evil of these oaths consists; though, in a more remote sense, superstitious oaths, like all other superstitious practices, have in them that which is the root and essence of idolatry.

But, however various the feelings connected with oaths may be, there is one operation from which they derive a great part of their force in most cases, and all their force in others. This is, *the production in the swearer, by reference to that which he regards with the greatest love, fear, or reverence, of a state of mind, in which he recognises to its fullest extent his obligation to speak the truth.* That this differs essentially from the other feelings which have been mentioned as connected with an oath, is clear: it does not profess to impose any new obligation; it does not profess to create any new responsibility arising out of the act of the swearer; it merely impresses on him the obligation which always and necessarily existed for him, and leaves him without the excuse of negligence or forgetfulness. Now it is in the production of this feeling that any real value which the oath may have really consists. So far as some new obligation to speak the truth is supposed to arise from the oath itself, it conduces to immorality and superstition: to immorality, inasmuch as it keeps out of sight the necessary and universal obligation to speak the truth; to superstition, inasmuch as it prevents men from feeling the eternal and universal presence of the God of Truth, and makes his intervention temporary and accidental,

the result of an act of the swearer. This view is so important and so forcibly put by Mr. Tyler, that his words may be quoted at the risk of repetition. (p. 13.)—"I cannot but consider it in itself an erroneous supposition and a cause of practical mischief, to consider either that God will become a witness of our words in consequence of our calling upon Him to witness them, or that his judgment will fall upon us in consequence of our invoking it. This error, it is to be feared, derives much countenance and encouragement from our present practice and the language which we usually employ. The only true state of the case is altogether opposed to this supposition, and we ought habitually to impress upon ourselves and others that God is and must be a witness of all we do and say without our appealing to Him to become so, and that He will punish falsehood and wrong without any invocation of his vengeance made by ourselves. He does not need us to draw his attention to our words or to the secret of our hearts: He does not need our permission to punish, should we dare to utter with our lips what our conscience knows to be wrong. The object of the form of adjuration should be to point out this, to show that we are not calling the attention of God to man, but the attention of men to God; that we are not calling upon Him to punish the wrong-doer, but on man to remember that He will."

If we put aside for the moment the question whether the obligation to speak truth is not in this passage founded too exclusively on the system of reward and punishment, or rather of punishment, nothing can be more forcible and just than this statement. But unfortunately, Mr. Tyler appears to have soon lost sight of the principle here so clearly enunciated. It is not a little surprising to find in the subsequent chapter an elaborate dissertation to prove from the Bible that oaths are in themselves lawful, and in the remainder of the book an endeavour to confine their use to particular solemn occasions, without any attempt to draw the distinction naturally suggested by the passage above quoted, and which affords the true solution of the question, whether the practice of taking oaths is compatible with morality and religion. That distinction has been already noticed, but its importance

must be an excuse for repeating it. It is this:—any ceremony which consists simply in a recognition by, or warning to a person of his obligation to speak the truth as in the presence of God, may be useful, and certainly is not essentially wrong or mischievous; but one which professes to create an obligation, or tends to produce a belief that it creates an obligation, is evil, inasmuch as it leads to immorality and superstition. If the latter is necessarily the meaning of the word oath, oaths ought never to be taken; but if the word includes the former, there are oaths which are innocent, and may be expedient.

This is not the place for a theological discussion, and therefore it is enough just to suggest that the above distinction may be found valuable by the commentators who, in their desire to defend our present system, have been reduced to great perplexity by such passages as *Matt. v. 34, 35.*; *James, v. 12.*, as any one may see who will consult the extracts given by Mant or Adam Clarke; and may furnish a better defence for the practice of administering oaths than the other passages commonly quoted for that purpose from the earlier Jewish history, and applied by a mode of argument by which it would be possible to justify slavery, common divorce, cruelty, the murder of captives in cold blood, bigotry, and other practices now acknowledged to be wrong. In fact, unless we adopt some notion of development and progressive cultivation,—unless we admit that a practice may have been intrinsically right at one period in the history of mankind, and may become intrinsically wrong at another, it is impossible to apply to our own practice the narratives of the Bible or of any other history with any good result; and surely no better sanction for such a notion can be found than the passage from the New Testament above alluded to, and the context, which contain an express substitution of a new and better morality for that which had before been considered the best.

Thus much upon the question what an oath is or ought to be in substance; the next step is to inquire what ought to be its form. And, first, is it to be an act of the person giving evidence or not? The question may, indeed, at first

sight seem to relate rather to the substance than the form ; and the general practice and opinion probably assumes it to be of the very essence of an oath that it should be an act of the person ; an inference which follows from all the definitions which are found in different writers on the subject. But this view has its origin in the assumption so generally made that an oath creates responsibility. If, as has been shown, it does not, the manner in which the independently existing obligation should be impressed on the witness is a matter of form, and it is only a question of words whether the ceremony ought to be called an oath or not. But however this may be, it is certain that if swearing creates no duty, an oath or ceremony taken by or administered to any person, however much his own act, can amount to nothing more than an acknowledgment of responsibility, and that its value consists in the evidence it gives of the consciousness of responsibility. If, then, it can be shown that, as evidence of this consciousness, any such acknowledgment must be quite unsatisfactory, and that, in many cases, it does and must, whatever be its form, operate mischievously, there can be no reason for requiring it. Now that it is really unsatisfactory as evidence of conscious responsibility, may easily be shown. Mr. Tyler, p. 15, defines an oath to be, " An outward pledge given by the juror that his attestation (or promise) is made under an immediate sense of responsibility to God." But a fallacy lurks in the word pledge : there is really nothing more than an assertion ; no pledge whatever is given for the truth of this assertion of conscious responsibility, unless the assumption of the liability to punishment for perjury be considered as such, and that might of course be attached to any false testimony given in a Court of Justice, whether upon oath or not. This assertion rests simply on the word of the witness. Then why should more credit be attached to it than to the evidence, the further assertions which it is supposed to confirm ? Is it likely that a man who has come prepared on so solemn an occasion to tell one lie, will hesitate to take upon himself the guilt of another ? Is it not probable, that having resolved to disregard the duty of speaking truth in one instance, he will disregard it in a

second, and profess regard for an obligation which he knows he does not entertain? Such, then, is the value of this so called pledge in the only respect in which it can be considered to be of any value. Now a useless promise or pledge is always a bad thing: but does not the one in question work peculiar mischief? There are and always will be cases in which, frame the acknowledgment of responsibility as you will, it will offend the scruples or be inconsistent with the opinions of persons of whose truthfulness there is not the slightest suspicion. From the objections made to oaths by different sects in our own country, we see how very difficult it is to avoid wounding weak consciences, or to fall in with the notions of persons whose very attachment to their opinions shows that they have some value for truth. It would be difficult to frame an oath or acknowledgment which would not operate as a test excluding some such persons from giving evidence. But a more important objection is to be found in the tendency of such a practice to perpetuate the notion above condemned, of an obligation originating in the oath itself. As long as the witness is required to perform any act, it will be to the act, and not to that of which the act is the mere sign, that the unthinking will attribute importance. On both these grounds, therefore, but more especially on the latter, it appears to be highly desirable that no act, promise, or assertion should be required from the witness, but that instead a solemn address should be made to him in the clearest and most impressive manner possible, pointing out to him the obligation under which he lies to speak the truth.

The preceding remarks virtually contain an answer to a question frequently raised, Whether an imprecatory form of oath is or is not justifiable? Of course, if the last proposition is admitted to be true, and it is allowed that no act should be required from the witness, the answer must be in the negative: but there are further objections to such a form. The common one, that a man has no right to imprecate the Divine vengeance on himself, is indeed of no great weight, unless in connection with the notion above condemned, that the punishment is to be a consequence of the imprecation, and not of the guilt of falsehood. Other-

wise the imprecation is nothing more than an acknowledgment of the justice of the punishment which the righteous Judge is to inflict on the witness if he speaks falsely. Still the imprecatory form, or rather the manner in which it is insisted on by lawyers, is highly objectionable to many people, and must grate upon the feelings of all. But a more important objection to this form is, that it bases the value of truth upon a system of rewards and punishments, or rather of punishments alone, and leads to a disregard of the fact, that there is something in human nature which, independently of future consequences in the way of reward or punishment, temporal or eternal, feels and recognises the excellence of truth, and the hatefulness of falsehood. This is so important a fact, that every effort should be made to abolish any practice which tends to obscure it. Human law here thrusts its imperfections into the sphere of morality, and treats the fear of punishment, the only motive it is able itself to create and apply, as the only ground, instead of one amongst other grounds, of moral goodness.

The result then of our inquiries is, that the administration of oaths is consistent with morality and religion only when the oath is confined to a recognition by the witness of the obligation that lies upon him to speak the truth, or to an admonition pointing it out to him; that the latter is far the better form; and that the imprecatory form is highly objectionable.

Let us now examine our present system by the above standard. The practice in our assize courts is as follows, and it is similar in all criminal and police courts. The witness is called into the box; the judge's clerk, probably the person who has served him as clerk at the bar,—a man, it is likely, of very little education, often of so little that his cockney pronunciation raises a smile in court,—says to the witness, "Take the book." A small Testament is handed to him. He perhaps has his glove on, or takes the book in his left hand. "Take your glove off," or, "Your right hand," says the clerk; the witness does as he is told. The clerk proceeds, "The evidence you shall give shall be the truth, the whole truth, and nothing but the truth. So help you

God." "Kiss the book" follows, often in nearly the same tone. Having done this, the witness is supposed to have become credible, if not contradicted by other testimony, or upset on cross-examination. The whole of this proceeding very often goes on as a kind of by-play between the clerk and witness, whilst Counsel and Court are engaged upon some discussion; and in no case has it that attention which the solemnity of the occasion requires. Then follows the examination in chief, on behalf of the person who calls the witness, which goes on quietly enough; and upon that follows the cross-examination on the other side. There are few lawyers who will not agree in saying, that the manner in which this is frequently conducted, when the witness is supposed to be hostile, is one of the worst points in our practice. The counsel too often seems to make the assumption that the witness has thrown away every vestige of feeling for truth and justice, and that the dictates of self-interest, arising from fear of the temporal and future punishments for perjury, are the only motives which can counteract his deliberate intention to tell falsehoods. "Now, sir, upon your oath, tell me," "You remember, sir, what it is to be upon your oath," and many other speeches of the kind, are reiterated again and again, frequently to such an extent, that an impression is created against the counsel and in favour of the witness.

It may be observed, by the way, that the oath administered to the jurymen is precisely similar in form and meaning to that taken by the witness; the only difference being in the thing to be done under its sanction.

In cases of evidence not taken in open court, *e. g.* affidavits and depositions, the form and manner of administering the oath are the same, though the practice is not open to the abuses incident to cross-examination in open court; whilst, on the other hand, the scene and occasion are not so public and solemn.

How far, then, is the present practice open to objections when tried by the standard above proposed: in what respects does it need amendment in order to come up to that standard? No one who is at all acquainted with the practice of the

law, can doubt that an oath is looked upon by most lawyers as creating the obligation. Indeed the point is so much taken for granted, that it is difficult to adduce specific authority for it. The following passages, however, are clearly founded on this notion:—“An examination upon oath implies that the witness should go through a ceremony of a particular import; and also that he should acknowledge the efficacy of that ceremony as an obligation to speak the truth. By taking an oath, a witness makes a formal and solemn appeal to the Supreme Being of the evidence which he is about to give, and imprecates the Divine vengeance on his head, if what he shall say should be false.”¹ “The first great safeguard which the law provides for the ascertainment of the truth in ordinary cases, consists in requiring all evidence to be given under the sanction of an oath. This imposes the strongest obligations on the conscience of the witness to declare the whole truth, that human wisdom can devise: a wilful violation of the oath exposes him at once to temporal and eternal punishment.”² The very great weight attached by all judges to the performance of some ceremony of the kind is only to be explained on the supposition that they consider it to carry with itself some obligation, and is not consistent with the notion that they regard it merely as the recognition of an independent obligation, required as evidence of that recognition only by a technical rule.³

There can be little doubt that the common notion of the nature of an oath is similar to that taken by the law. It would not, perhaps, be difficult to adduce passages from learned writers and thinkers on moral philosophy to prove this, but it is unnecessary for the present purpose so to do; it is sufficient if it can be shown that the above notion is generally entertained by the unreflecting and the unlearned. And of this no one can doubt, who will call to mind what were his own notions when he first began to think upon the subject, and what he conceives the notions of the majority of

¹ Phillips on Evidence, 9th Ed. p. 8.

² 1 Starkie on Evidence, 3rd Ed. p. 21.

³ See the Judgments of Lord Hardwicke, C. J. Lee, C. J. Willes, and C. B. Parker in the well-known case of *Omichund v. Barker*, 1 Atk. 19 to 50.

the persons he knows to be. Is there not in general some undefined awe attached to taking an oath which is not attached to making the most solemn assertion? Do not most persons, even if they do not distinctly recognise the creation of an obligation by the oath, allow the effect of it to remain unexplored in their minds, a kind of indistinct, gloomy phantom, the true offspring and nurse of error and superstition. This is a most important point; for it is most certain, that if religion and morality are to be placed on their right footing, men ought to use all their powers to distinguish what they have faculties to distinguish, and that nothing conduces so much to superstition, and its inevitable attendant, scepticism, as confounding what we can comprehend with what we cannot comprehend in one vague, formless cloud of mysticism.

That our present legal practice has the greatest influence in keeping up the erroneous notions concerning oaths above mentioned, is very clear; for it is founded on those notions, and is in continual action before the eyes of the people. In every Assize and Police Court, filled as they are with the poor and uneducated, the Law is daily and hourly exhibiting its adherence to this notion. There is, perhaps, no one other amongst its doctrines so perpetually enforced. Therefore, if it is important that men should have right and clear views of the obligation to be truthful, and of the relation this obligation bears to religion, if their present notions about an oath confuse and obscure these views, — and if the present practice of Courts of Justice very materially helps to keep up these notions, it is most desirable that this practice should be changed for one which, instead of obstructing the interests of morality, might further them by leading to right views on these subjects.

It is not clear at first sight that the oath is imprecatory, for the words, "So help me God," convey that meaning only by implication: they take the affirmative side, and leave the imprecation of punishment, or, which is considered the same thing, the deprivation of divine assistance, to be implied from the word "so;" *i. e.* "So, and not otherwise, help me God." The definitions in the earlier writers do not necessarily imply

the imprecation. Thus Fleta, lib. v. c. 22. gives the following definition of an oath:—"Juramentum est affirmatio vel negatio de aliquo attestazione sacræ rei firmata," and Coke, 3 Inst. 165, says that "an oath is an affirmation or denial by any Christian man of any thing lawful and honest, before one or more that have authority, to give the same for advancement of truth and right, calling Almighty God to witness that his testimony is true."¹ But there can be no doubt as to what the present view of the law is. The question invariably asked of the suspected witness is, whether he believes in a God who will punish him if he swears falsely: and this belief is undoubtedly the legal criterion. In the case above alluded to², Lord Hardwicke says, "What is usually understood by an oath is, that the person who takes it imprecates the vengeance of God upon him, if the oath he takes is false." In the same vol., p. 27, Sir Dudley Rider says, not in very correct language, "All that in point of nature and reason is necessary to qualify a person for swearing is the belief of a God, and an imprecation of the Divine Being upon him if he swears falsely." The whole of the arguments in that case will be found to rest upon the notion of punishment. In the Queen's case³, Lord Tenterden lays down, "that if the witness says he considers the oath to be binding on his conscience, he affirms in effect, that in taking that oath he has called his God to witness that what he shall say will be the truth, and that he has imprecated the Divine vengeance upon his head if what he shall afterwards say shall be false." It is needless to multiply authorities: but the first two chapters of Phillips on Evidence and the authorities there cited abundantly support and illustrate the position that our oath is looked upon by law as imprecatory. Therefore in this respect also our present system needs amendment.

Not the least objectionable part of the practice is the actual form employed. It would be hardly possible to invent one more calculated to foster the evils we have pointed out, one more essentially formal and absurd. That there is some peculiar virtue in kissing the calf skin cover of a book, that

¹ See other old definitions of a like general nature, 1 Atk. 22, 23.

² 1 Atkins, 20.

³ 2 Br. and Bing. 284.

it makes an essential difference whether a man has a glove on or not, that the strength of the moral obligation to speak truth, is materially lessened if the thumb and not the book touches the mouth, these are notions we continue to foster by our practice, in an age which pities and despises the veneration our ancestors entertained for relics, and very justly regards the great frequency of oaths taken upon them as the fruitful source of the perjuries which historians tell us were so common in the middle ages.¹

That the evils above complained of have not escaped the notice of sensible and unprejudiced persons will appear from the following extracts. The Report of the Select Committee of the House of Lords above alluded to, after stating that this country has long laboured under a reproach of a prevailing inadvertency to the solemn and sacred nature of oaths, owing in part to the forms in which they are conceived, partly to their frequency, and partly to the levity and indecency with which they are too often administered, and that the Committee were of opinion that the oaths employed in the administration of justice would admit of some diminution in number, and of great improvement as to the form in which they are conceived, and the mode in which they are too frequently administered, contains the following passage:—"An evil which cries loudly for reform is the indecent mode of administering oaths, and the consequent want of reverence in taking them, which too often disgrace our courts of justice. Although the Committee have not yet gone into evidence upon this point, they do not scruple to advert to it, as being too notorious to be denied, and they cannot help expressing a hope that some remedy for this evil may be devised by those learned and venerable persons under whose cognisance it more immediately falls, and who are most competent to deal with it." Paley, in his *Moral Philosophy*, Book iii. ch. xvi, says, "In no country, I believe, are the forms of oaths worse contrived either to convey the meaning or impress the obligation of an oath than in our own," and after describing our legal oath, he continues, "This obscure and elliptical

¹ Hallam's *Middle Ages*, vol. II. p. 456., 1st ed. Hume's *Hist. of England*, vol. I. p. 222., App. i. Tyler on Oaths, p. 285.

form, together with the levity and frequency with which it is administered, has brought about a general inadvertency to the obligation of oaths." Mr. Tyler, p. 165, after quoting Paley's opinion says, "I have already confessed this to be the inference to which patient inquiry and calm reflection have led me, at least as to the careless indifference with which oaths are often administered in public among us, compared with the solemn manner usually observed in other countries. Lamentably full of superstition as are many of the forms of other nations, some revolting to our best feelings as Christians, others degrading to the very characters of men, in that one point of conveying the meaning of an oath, and impressing its obligation, I cannot find one more objectionable than our own."¹

Our system then, it is plain, requires alteration; and the above investigation of the principle on which oaths should be administered renders it easy to suggest the general character of the system which ought to be substituted, whatever difficulties there may be in carrying it into effect. The only properly admissible oath or ceremony in the nature of an oath is, as we have seen, one calculated simply to remind the witness of the obligation that lies on him to speak the truth. It is most desirable that this should be done with as much solemnity as possible, and that every effort should be made to prevent it from becoming a mere form. To secure this it is desirable in the case of evidence being given *vivâ voce*, that the chief judge or magistrate present should, in a few solemn words addressed to the witness in the hearing of the whole court, caution him to speak the truth. The judge in Scotland administers the oath, and the effect is said to be very impressive; and there seems to be no reason why in this respect we should not follow the example so set us. It would perhaps cost the court some little time and trouble, but this disadvantage would be amply compensated by the additional weight given to the ceremony. If this suggestion were adopted, some short and simple form might be given as a guide, but it would be much better not to tie the judge to the use of it, but to allow him to vary or add to it in any

¹ See also his observations in ch. viii. of the same work.

manner which the circumstances might seem to him to call for. This would do much towards preventing its degenerating into an empty form; and if any objection is made to the likelihood of having sermons from the Bench, the reply is, that in this case something of that nature would be in its proper place.

With respect to affidavits, depositions in Chancery, and every thing in the nature of written evidence, which is taken in a less solemn manner, with less publicity, and before a person holding a less imposing station than a judge in open court, and who frequently cannot know any thing about the subject-matter of the evidence, some set form might be provided to the same effect as the admonition given in open court: but a point should be made of always having this form administered not only in the presence of, but *by* some person holding as high a judicial station as is consistent with convenience, for instance by a Master in Chancery, and in no case by such an inferior officer as a mere clerk.

Any such plan is likely to meet with great opposition: many objections will be taken, and must be answered; but there is one so obvious that it is better to meet it by anticipation.

It will be said that it is of the greatest importance to obtain true evidence in courts of justice: that men are not capable of acting on the grounds of pure morality and religion; that the present system, though superstitious, constrains them to speak the truth; and that if this barrier is removed, a deluge of false testimony will break in upon us. The answer to this objection is, that if the present system has the effect attributed to it, it must be by its working upon, and thus cherishing, superstition and ignorance. The upright and thoughtful man would feel himself bound without such oaths: they do not bind the clear-sighted knave: they affect only the superstitious and ignorant, or half-dishonest, by calling into exercise and fostering false and pernicious notions of duty. Now, though it is of importance that evidence in courts of justice should be true, it is of still greater importance that the interests of morality should be preserved inviolate; and therefore, if a rule of law, which in its own

sphere works well, happens to conflict with these, it ought to give way. But does the system work well? Does it really secure the discovery of truth? Is perjury such an uncommon thing? The answers of persons who have experience in these matters would, if it were possible to obtain them, show abundantly that this is far, very far, from being the case. We appeal to the experience of all who have been in the habit of attending our courts of justice, whether that which actually gives credibility to the testimony of a witness is the supposed sacredness of the oath under which his testimony is given, or the straightforwardness and apparent honesty of the testimony itself? whether in practice judge, jury, or counsel rely, for the prevention of false testimony, on the dread felt by the witness of the Divine wrath as the consequence of perjury, or upon the apprehension entertained by him of a keen cross-examination, and the efficacy of that powerful, though often much abused, instrument for laying bare the mazes of deceit? Or, again, we would ask, if the oath and the fear of perjury is so efficacious in bringing truth to light, why is it that so little weight is attached to affidavits? that written interrogatories, administered under the sanction of the same oath as that used in open court, are notoriously considered inoperative to prevent evasion or falsehood? The fact is, that the practice is suicidal: the first step is to introduce false motives for speaking truth: the consequence is, that the duty is neglected in cases where those motives do not exist; and, in the end, the false motives, which are only strong whilst blended with the true ones, lose their weight, and every barrier against temptation, every safeguard of duty, is gone. Notwithstanding the apparent absurdities of the Quaker practice, it is a profound truth, that, if we would bring men to recognise the evil of falsehood in courts of justice, we must first teach them to regard with serious earnestness the yea, yea, and the nay, nay, of their common life.

But if it is true that the present system has any considerable effect in causing truth to be spoken, surely this is the strongest argument for its abolition; for as it has been shown that it can only have that effect by appealing to and en-

couraging what is evil, the mischief produced by it must be great in proportion to that effect.

It must be admitted that there are many cases where an erroneous form is to be retained for the practical good which is attained by its use ; that much harm is sometimes done by attempting to set right mistakes and inconsistencies, which are combined with what is practically useful ; but this can never be the case where the erroneous form or inconsistency causes an evil greater than the good derived from it ; still less where it has ceased to be transparent, and distorts or conceals the truth it was meant to clothe. In such a case it ought to be put an end to, whatever be the immediate inconvenience of the consequences. If our present system of administering oaths conceal the real nature of truth, of moral and religious obligation, if it tends to prevent men from gaining right views of these most momentous subjects, and from acting upon them, then let it cease, whatever be the amount of temporary inconvenience caused by its cessation. Its cessation is a necessary step towards getting things into that state in which persons will be much more likely than they now are to speak the truth in courts of justice, as well as elsewhere, because they will do it on truer, nobler, and holier grounds ; and the inconvenience, if (which is not probable) any considerable inconvenience shall be found to result from its abolition, will be but one instance among many of that stern but wholesome system of retributive justice under which, in the economy of the Divine government, man has to bear the penalty of his departures from the path of right, in order that he may attain the advantage which assuredly will follow from a return to and perseverance in it.

ART. V. — EXPERIENCES OF A GAOL CHAPLAIN.

Experiences of a Gaol Chaplain; comprising Recollections of Ministerial Intercourse with Criminals of various Classes, with their Confessions. 3 vols. Bentley, 1847.

THIS is an amusing book, and as a part of it bears upon some of those subjects which have lately engaged our attention, we gladly avail ourselves of it, to relieve our pages from that dryness which we fear is but too apt to infect them, to save us from which no Kyan has as yet been born. Whether the title page tells a true tale, whether this book be written indeed by a gaol chaplain, does not matter much for our present purpose. Whatever gown the author wears (and we should say it is *not* that of a curate, if any), there is no doubt he is familiar with the inmates of a gaol, and has the talent of describing with very telling effect the scenes which he has witnessed as connected with them. As to this, we shall allow our readers to judge for themselves. Let us begin with a strange story (which we shall abridge), professing to relate what passed between one Stark, a governor of a gaol, when a police officer, and the late Lord Castlereagh, when Foreign minister.

“I had been attached about a year and a half to the — Street division, when I received a private summons to wait on Lord Castlereagh. You will not recollect him — his Lordship passed away from the scene before your time. In fact all that relates to him is now become matter of history. Calm, passionless, and frigid, his bearing in public and in private were most opposite. In the House of Commons a more diffuse speaker, one more capable of involving his meaning in sentences of interminable length — sentences which some unscrupulous opponents asserted had no meaning in them at all — could not be found. But, in private, no man could express his meaning with more precision, or place in fewer words the subject he was dealing with clearly before his auditor. His temper has been described as singularly gentle and equable. To this length, indeed, some of his eulogists

have gone, that his equanimity and self-possession were so perfect that no circumstances, however annoying, could ruffle him : did they ever see his Lordship in private, and witness how he *there* bore opposition and defeat ? I have. His silent rages were formidable ; few cared to witness them twice. He was a remarkable man ; but among other features in his character which would have borne improvement was this, — *he never forgave !* Speed his wishes, compass any point he was desirous to carry, procure him accurate information on any doubtful or intricate matter, and your reward would be prompt and ample. But fail, and your position in his Lordship's memory was irreversible. . . .

"Now to the interview. I was desired to shun the Foreign Office, and attend him at his private residence. I obeyed. He desired me to discover, without delay, 'the whereabouts' of a foreigner who had come over to England for some unworthy purpose, and whose career of usefulness Lord Castlereagh was desirous to curtail. The Alien Act, then in force, gave him the power. He described the obnoxious party to me very minutely. His height, his walk, a slight hesitation in his speech, the colour of the eyes, a scar near the left temple ; all these minute particulars were severally pointed out, and despatch insisted on. No clue could Lord Castlereagh give me as to the habits, associates, or haunts of the suspected party : on all these points he professed entire ignorance. The pecuniary recompense attendant on success was tempting ; to this was added the promise of future advancement ; and his Lordship wound up the interview with the remark, 'The Comte de Chabôtière is assuredly somewhere in the metropolis, and, if so, accessible to the police : you *MUST* produce him.'

"I bowed, and withdrew.

"The anxiety evinced by my employer to *nab* this delinquent foreigner naturally roused my curiosity as to his real or presumed offence. But on this head no hint escaped the lips of the cautious diplomatist. Afterwards, I discovered, from a stray expression, that the Comte's object was to surprise that well-fed, good humoured old gentleman who was then living at Hartwell ; who loved his ease much, and a well-spread board more ; whom fortune, a few years afterwards, perplexed with the cares and perils of a crown ; and whom the Holy Alliance with difficulty kept upon it at the point of the bayonet. It was not till many months afterwards that the future Louis XVIII. was apprised of the scheme of Monsieur Chabôtière, and the complicated villanies of which he was the intended victim.

"Days elapsed without my making much progress in my task.

The chagrin of Lord Castlereagh was great, and my hope of securing his patronage proportionably faint, when the passion for play common to most Frenchmen occurred to me, and suggested that possibly the exotic might be met with in some gambling den ! By dint of cautious but unceasing inquiry, unmeasured bribery, and weighty promises, I at length discovered that in a certain low gaming-house, near Leicester Fields, much frequented by foreigners, a party had for two successive nights been seen, whom, by description, I recognised as the long-sought Frenchman. A *golden* key and a clever disguise procured me admittance. In a large ill-lighted room, shabbily furnished, and redolent with cigar-smoke, was a *rouge et noir* table. On it were fixed the eyes of a motley group ; all anxious, all earnest, and all looking more or less miserable, haggard, suspicious, and vindictive. The stakes were not high : it was '*a silver hell*.'

"The room filled—I looked on ; probably the most unconcerned, and certainly a most amused spectator. The jargon was strange enough. Each nation on the globe seemed to have sent its representative. But French was the language generally spoken ; and in all dialects, and with all accents. My disguise was so good that I defied detection ; and the impression of perfect security added confidence to my scrutiny of those around me. In none could I detect Monsieur de Chabôtière. The only person who at all resembled him was a stout, burly man, who answered to the name of 'Jack Vincent ;' spoke English fluently ; and growled and cursed in British with a heartiness and emphasis truly national. One amid the moving group long arrested my notice ; an aged man, with white moustache and snowy hair ; from his accent a German ; and from the coolness and pertinacity with which he confronted the most untoward fortune, a practised and determined gamester. While I watched his play, and admired the calmness with which he paid his losses, it struck me that his features were not strange to me. Another gaze—'No ; it is mere fancy ! I have watched the old German so intently, that present familiarity with his countenance has conjured up the phantom of previous intimacy. Yes ! it is delusion altogether. We have now met for the first time.'

"I had reasoned myself into this conviction, when the white-headed gamester spoke. Again I was startled. The fulness and firmness of the voice contrasted strangely with the advanced age and apparent feebleness of the speaker. The voice was that of a young man of eight-and-twenty. The hoary foreigner looked at least sixty-five. 'There is mystery here,' was my conclusion

'mystery and disguise! Is the appearance of age assumed? Can I—?' Four struck. The manager rose and declared the table closed. In silence his visitors understood and obeyed the signal; and in a few moments the room was empty. My walk homewards was dispirited enough, and my rest sufficiently broken. I had been misled. The count was not among the visitors in ——— Street. That was quite certain. But, would that explanation satisfy Lord Castlereagh? I had grievous apprehensions upon the point. Then, again, who was the losing gamester? Some strong motive there must be for the assumption of age! Could he be the Count de Chabôtière? No! My judgment rejected that conclusion instantly. While revolving in my mind the perplexities of my position, and inwardly cursing my own folly for embarking in the scheme, my muddy reminiscences cleared up as if by magic. The white-headed gambler and I had met before. I recollected him well. He was the collecting clerk of Messrs. Roddam, the bankers, in Lombard Street. Having refreshed my wearied spirits with the thought of the agreeable surprise with which I should greet the stiff-necked firm, I dozed off in high good-humour with my own penetration.

"My first care on the ensuing morning was to assure myself of the identity of Mr. Mears, the banker's clerk, with my venerable acquaintance at the silver hell. To this end I presented myself at Roddam's about the hour of three, when I knew the customers of the firm would be numerous, and the clerks in full force. I was not disappointed. Perched on a high stool, before a small square desk, a little in advance of, and severed from the rest, with one pen stuck behind his ear and another hard at work on a ponderous ledger beside him, dressed with extraordinary precision, and looking a living personification of decorum and propriety, there sat the confidential. Never upon this earth did man possess a more valuable set of features. What! couple with that grave, respectable, subdued visage, rouge et noir! The very mention of such profanity would make its owner faint. Play, and within the purlieus of a common hell! The Bishop of London as likely. True, the white moustache, and the silver locks, and the golden spectacles were wanting. But—another look—no, I was not—I could not be mistaken in my man: the sexagenarian at the silver hell and the demure Mr. Mears were the same. Night came on, and again I found my way to the reeking pandemonium. The room was well filled; and keenly did I gaze on its slovenly occupants, in the hope of recognising the count; but in vain. Nor did Jack

Vincent present himself. As the 'small hours' advanced, 'the confidential,' looking as aged and venerable as ever, crept in. This night fortune smiled, and after availing himself of her favours to the last moment, he retired a considerable winner. But what mood was mine? At noon I had to face the foreign secretary. How would he receive me? What intelligence had I to give? Bitterly did I recall the Scotch proverb, 'Woe to them who approach a great man with an *empty wallet*.'

"My reception was chilling enough. The minister's brow was as smooth as usual, his voice as steady, and his address as courteous; but there was a suspicious sinister look about the eye, a fixedness and bitterness in its expression, which disconcerted and discouraged me. In those gentle, persuasive, agreeable tones, for which he was so remarkable, he blandly inquired, 'What information have you to give?' 'None; I have failed, my lord—I say it with extreme concern,—in tracing the party.'

"His searching gaze was bent on me for some moments. There was a curl of the lip as his scrutiny ended. *I saw he disbelieved me!*

"'You have nothing, then, to tell?' 'Nothing, my lord; nothing entitled to reliance: nothing beyond mere conjecture.' 'I understand you, I presume, correctly? You can give me, you mean to say, no clue as to where that party is at present; or where he will be to-morrow; or where he was two days since?'

"'None whatever.'

"'Then I can. The count is now across the Channel; will be at midnight far on his road to Paris; and was on two evenings during this very week in Leicester Square gaming-house. You know it, sir. You know it well. Affect no subterfuge with me. No one is so well aware as yourself, that "Jack Vincent" was the Count Chabôtière!'

"I was speechless; not, as his lordship fancied, from guilt, but from unbounded surprise. Recovering myself, I eagerly and positively disclaimed all knowledge that the count and Vincent were the same.

"'And you say this to me!' exclaimed the minister, with bitter emphasis; 'to ME, who *know* that you stood more than an hour by the side of this man; talked to him; jested with him! Desist from such useless asseverations. Me they will not deceive.'

"Again I was at fault. Here was *espionage* with a vengeance! I, then, had been under *surveillance*! This was eaves-dropping in perfection! Spy upon spy! I, who had been intently watching the movements of others, had been the while myself closely

observed, and accurately reported on! My mortification was great, and vented itself in the remark, —

“ ‘ Watched as I may have been, my lord, and suspected as I see I am, I have been true to your interests.’ ‘ You are more than suspected,’ was the reply. ‘ I have proof of your duplicity ; and that proof is the escape of the adventurer.’ ‘ My lord, if the most solemn assurances ——’ ‘ Reserve them for another party,’ said Lord Castlereagh, with cutting coolness ; ‘ here they are wasted. The case is clear. I have been outbidden. I promised you much for the count’s apprehension ; more has been held out to you to connive at his escape. You have made your election. The door, sir.’ ” (vol. ii. pp. 1—11.)

Having failed as to the count, our police officer resolves on seeing what he can do with bankers. He was at first disbelieved by them, but soon afterwards they think better of it, and he is employed to arrest the gambler-clerk, who offers him large sums for five minutes’ privacy, which he refuses. The clerk is convicted and transported, on the evidence of Stark.

“ ‘ What did the firm lose by him ?’

“ ‘ A sum so large that they never cared to divulge it. Heavy it undoubtedly was ; but its amount they prudently made one of the secrets of the firm.’

“ ‘ Surely, that was a remarkable feature in the case ?’

“ ‘ This was more so,’ replied the governor, testily. ‘ When the trial was over, and the conviction recorded, and the sentence passed, Messrs. Roddam sent for me.

“ ‘ Mr. Stark,’ said the spokesman of the party, ‘ the tact you have shown throughout this sad business is remarkable ; and the firmness with which you treated the prisoner worthy of all praise. You are a valuable officer ; and your country is much indebted to you !’

“ ‘ This was *quid pro quo* for refusing four hundred sovereigns ! This was “ value received ” for declining to lose sight of my prisoner, and preventing his destroying or concealing any of his papers. I convicted him, sir ! Yes, I, John Stark, governor of his Majesty’s gaol of —— . Said I not well, Mr. Cleaver, that my integrity had been my ruin ? That my own disinterestedness of character had been my bane through life ? I am, I repeat it, an injured and ill-used man.’ ” (vol. ii. pp. 25—28.)

This, we dare say, describes correctly enough the tone of police morality. Let us turn to another subject. The Chaplain gives us an account of a conversation which he had with a game-law offender.

“ ‘The game laws are bringing about a state of oppression and tyranny on the one hand, and of resistance and crime on the other, which would disgrace a land inhabited wholly by heathens. Poachers are hunted down by landowners and their gamekeepers, as keenly and as fiercely as the early settlers in America hunted down the natives. Being but men, they naturally resist. Hot words are followed by fierce blows. Life, in some instances, is taken. The law then steps in ; and the upshot is the scaffold, and the hangman, and the drop, and the noose, and the dying struggle, and the death-shriek. And all this, for what? A partridge or a pheasant! But the gentry *must* have them, it is said, on their tables, because game is a rarity, and because it is nice and delicate eating. Be it so. Let their appetite be indulged. Let them enjoy their dainty right merrily. They cannot fail to do so, when memory reminds them it is garnished with blood!’

“ ‘These remarks by no means befit your situation ; the peril you are in should prompt feelings of greater humility and submission.’

“ ‘Say you so? then you know nothing of the workings of a poor man’s spirit. I tell you, sir, no artisan who has been once in gaol for any offence growing out of the game laws, but becomes thenceforth thoroughly hardened ; hates from the bottom of his soul all landed proprietors, and lords of the manor, and becomes worse than a radical in his opinions ; you make him little short of a republican ! But all this is beside the business. I want no exhortations about repentance, for my heart does not condemn me. I require no admonitions about preparation for death, because I’m satisfied no English jury will convict me. I don’t say this to you, sir, either from ignorance or impertinence ; but because your time can be better bestowed elsewhere.’

“ I acquiesced in his conclusion, and quitted him.

“ The assizes drew on, and with them the hour of his peril or deliverance ; and still his mien was as assured, and his language as confident as at his commitment.

“ His trial came on late in the assize week ; and to the very morning on which it was to take place his extraordinary nerve was true to him. But all at once—a few moments before he was brought into court—the restraint he had put upon his feelings

gave way before the horror of his position, and his stalwart form shook with agony. Placed in the dock, he grasped its sides convulsively to maintain an upright position; and as the jury came up into the box to be sworn, scanned each with an eagerness and intensity of observation painful to witness. It struck me then and afterwards—I watched the scene closely—that there was a look of intelligence, a glance of recognition, of *satisfied* recognition, exchanged between the prisoner and a jurymen, which did much to re-assure the accused. The party referred to was a respectable looking man of forty, with something bordering on quakerism in his garb, bland, sleek, and smiling, but with a most subtle eye. A white pink of unusual size adorned his snuff-coloured coat; and I suddenly became possessed with the notion, of which I never could rid myself, that this flower formed a medium of communication between the parties." (Vol. ii. pp. 148—151.)

The trial closes, the jury are directed to consider their verdict, but the Quaker remains firm. The scene which follows, we apprehend happens at every assizes, and must happen so long as the unanimity of the jury is insisted on.

"Night was now at hand, and the countenances of the eleven looked all more or less irritated. The foreman's face was like a peony, a waggish spectator suggested, from the heat of argument; while a stout, well fed, well dressed yeoman, evidently no convert to the duty of fasting, put his hand over his capacious diaphragm and sighed, deeply and touchingly. His neighbour, a bilious, sallow-faced, dejected being, was in a paroxysm of perplexity at the prospect before him; and, in the desperation of the moment volunteered some remarks, half inaudible from agitation, to the judge, in which the word 'law' recurred again and again.

"His lordship floored him at once, 'Your office is to pronounce upon the prisoner's innocence or guilt, from the evidence submitted to you. Mine is to explain to you the law. If any point of legal difficulty causes you embarrassment, state it, and explanation shall be given. With you lies the verdict. An immense mass of evidence has been laid before you, all, I presume, that could be collected in reference to the transaction. Decide upon it. If you have any doubt, the prisoner is entitled to the benefit of that doubt.'

"The Court soon afterwards rose, the jury were locked up, and loud and bitter, and conflicting were the sounds which issued, hour after hour, from their chamber of deliberation. At nine

o'clock there was a lull. At ten they spoke with less energy, and at rarer intervals. At eleven they announced to their keeper that they were 'agreed;' were taken to the Judge's lodgings, received by the proper officer, and to him delivered a 'verdict of 'NOT GUILTY.'" (Vol. ii. pp. 154—156.)

Let us add some sensible reflections on jury-trial, in which all who have had any experience at *nisi prius* will probably agree.

"What a trivial incident often determines the verdict of a jury; a fact injudiciously disclosed, a line of cross-examination indiscreetly pursued, the calling up of one blundering or unwilling witness, the dispensing with the testimony of another, each of these, in turn, has led to unmerited defeat; while, on the other hand, a touching appeal to the feelings of a jury, or a bold and dexterous descent to, and adoption of, their coarser prejudices, an apt repartee, a happy retort, a humorous illustration, has crowned with undeserved triumph many a desperate case. A higher intellectual treat, than that afforded by the genius of an able and practised counsel, can scarcely be presented to a thoughtful mind. Clear and consecutive in his reasoning, quick and subtle in the knowledge of what to present and what to withhold, carrying his audience along with him while he takes a full view of the whole bearings of a question, and the relation in which it may stand to general or special laws; lulling all suspicion, and inducing, by the common sense and practical experience he displays, a feeling of thorough security in his averments, we forget that he is a paid advocate, and extend to his integrity that conviction, which his facts and his arguments have forced us to yield to his judgment.

"Nor, in dwelling on the 'glorious uncertainty,' must it be forgotten, that occasionally a counsel takes a view of the case totally opposed to that which his brief suggests to him. He not unfrequently dares to think for himself, if erroneously, frightful indeed is the penalty paid by those whom he represents.

"Thus did I reason during the trial for murder of Reza Gray, a deeply wronged and desperate woman, who for a short period came under my care. She was defended, in the absence from sudden illness of his leader, by a junior counsel, who aimed at the reputation of 'an immensely clever young man,' with 'very original views,' and, who 'had an opinion of his own' on most points. He chose to consider her guilty, and as such treated her. She asseverated her innocence. Repeatedly, and in solemn terms,

did she protest that she had no knowledge, direct or indirect, of the crime laid to her charge; but her counsel, instead of crediting her, and subjecting to severe cross-examination the deponents against her, raised this point of law, and that point of law (which the judge successively overruled), and showed an evident reluctance to cross-examine any witness for the prosecution, apparently from a dread of eliciting facts unfavourable to the prisoner. His defence was a series of quibbles, not a thorough sifting of facts. The result was—but I am anticipating.” (Vol. ii. pp. 102—105.)

We cannot give the trial at length: the result was, that the clever junior hanged his client, although innocent.

We think these volumes, besides affording the reader some amusement, may be read with instruction by the young lawyer. With some exaggeration, and a spice of book-making, they contain a series of incidents, most of them new; and introduce real men and women with considerable effect. We shall conclude this notice with one or two further extracts, giving the author's opinion on punishments:—

“ There is an urgent want, and our legislators should look to it, of an asylum for penitent offenders. They demand it at our hands. Nor can we withhold it, unless we are prepared to adopt the hateful jargon—that the vicious are irreclaimable. Can any situation be more piteous, than that of a prisoner just liberated from the thralldom of confinement, full of remorse for the past, of anxiety for the future, and without shelter, food, or friend, for the present? We gaze too far a-head: philanthropy, now-a-days, looks only through a telescope; distant objects alone command attention. The heathenism of the blacks in Africa, the idolatry of the worshippers of Juggernaut in India, the enormities of the opium trade in China—these are duly deplored, and deeply considered; but gin-palaces at home are viewed with indifference, the heathenism of our factory districts dismissed with a sigh, and the desolation of the penitent prisoner pertinaciously overlooked. For him there rises no city of refuge. Alas, when will the religious, and the benevolent, and the zealous amongst us admit, that our first sphere of duty lies amongst the wretched at our own doors? But to my tale. The period of Lydia's imprisonment expired, and the penitent girl was liberated. A little pecuniary assistance was given her for her immediate wants, and a few well-meant directions for the future; but no permanent effort was made to keep her in

the path of duty. She took leave of me with a burst of tears ; and even now I seem to hear her anguished exclamation as she passed through the prison-gates : ‘ God pardons the penitent, man spurns them.’ ” (Vol. i. pp. 201, 202.)

As to the tread-mill : —

“ I was placed upon the mill. Its punishment was to reform me. Reform me ! It made me irritable, quarrelsome, sullen, savage. Reform me ! It merged my thoughts in bodily fatigue and exhaustion. Instead of encouraging me by cheerful employment in prison, to seek labour as the means of honest subsistence when I left it, it confirmed me in my hatred to labour, by compelling me to submit to it in its most painful, irksome, and exhausting form. And yet there are those who have greater cause to complain of it than myself. If men — young and strong men — sink under its infliction, how can it be expected that women, weak and wretched women, can bear up against it ? There are very few of them who can undergo such labour : there is the greatest difficulty in teaching them to be upon the wheel, and escape accident ; and frequently have I known women bleed at the nose when first put to the wheel. How many have been caught in the wheel, and maimed by it for life ? And yet there are humane and benevolent individuals who contend for it as a proper punishment for women upon prison diet ! And the Judges wonder, and gaolers complain, that prisoners — their period of confinement completed — leave the prison walls more sullen, callous, hardened, desperate characters than they entered them.” (Vol. i. pp. 27, 28.)

Nor is the following extract from the Preface to be neglected : —

“ Not less pernicious is the identification of punishment with correction — terms which have long passed as synonymous, though they have no mutual connexion whatever. Correction means a setting right ; and, as most schoolboys painfully know, the orthodox mode of setting the mind right is to set the body wrong. The external application of birch is supposed to facilitate the internal reception of learning ; and all the difficulties of master or teacher are deemed to be summarily removed by the rod. The means are not adapted to the end ; indeed, they are only suited to the reverse end in every sense. Experience is just beginning to expose this inveterate blunder in education ; flogging is going out of fashion ; and people are beginning to suspect, that the rod in most, if not in

all cases, was merely a barbarous expedient to hide the incapacity of the teacher. It would be well if this beneficial lesson were generalised—if the world could be taught that, punishment is so far from being an essential element of correction, that it very often hardens in guilt, and destroys all chances of amendment. A correctional system, of course, presupposes that there is something to be corrected. It is therefore a legitimate inference that, while we are examining how wrong may be set right, we might beneficially extend our researches, and inquire how far the wrong might be prevented from the beginning. If crime be as necessary a result of the workings of society, as friction of the operations of machinery, it may still be possible to diminish the wear and tear of the engine by a better adaptation of its parts. No mechanist hopes that he can ever wholly get rid of friction—his aim is to abate its intensity, and not its extent. In the same way the moral economist does not speculate on the utter extirpation of crime,—scarcely, perhaps, on a numerical diminution of offences; but he believes that the intensity of criminality may be greatly abated; that offences may be gradually stripped of their aggravating circumstances; and that the same number of crimes shall not give the same amount of guilt." (Preface, pp. xvi — xviii.)

ART. VI.—THE NEW PILGRIM'S PROGRESS.

CHAPTER III.

THE lark did not welcome the first beam of the sun with greater alacrity than Pilgrim, who was soon ready to pay his respects to the Lady Common Law, by whom he had been thus kindly entertained. Indeed, he had passed a restless night, thinking over the great adventures that the morrow might present to him: for, to one conscious of the power of performing great actions, there is ever a restless void in the mind until they are achieved.

After partaking again slightly of food, Pilgrim was informed, that it was the intention of his illustrious hostess to summon her various retainers to a large open space adjoining the mansion, and that his presence was requested at the meeting.

To this he forthwith repaired, and found a great party assembled. The Lady was seated in a chair of state, and her adherents and officers were ranged around her. She invited Pilgrim to approach and stand at her right hand. Then rising, she thus addressed the company : —

“I have requested the presence of my friends, relatives, and adherents to-day, to ask their assistance in an adventure of great importance to us all. You know how long we have been troubled by the monster FEUDALITY, who, although somewhat enfeebled by age, and the many blows that he has received, is still an inveterate, troublesome, and dangerous enemy ; appearing when we least expect him, interfering in many important matters, and exacting a constant and most expensive tribute. You know we cannot part with a morsel of land without his consent, and sometimes he won't let us sell it at all. And all this is of recent invention, for I remember the time, when an estate in land might be bought and sold as easily as a horse. Now, my friends and relatives, how long are we to suffer these oppressions, and are we to make no attempt to rid ourselves of them ? Here is a valiant gentleman who has honoured us by his company, and who now stands on my right hand. He is willing to do battle with this creature. But not doubting his valour or conduct, I remember that this monster is still strong and subtle, and that he has a cruel nature : I would willingly find some of you ready to accompany our champion here to aid and assist him. Which of you, then, will join him ?”

Now, the persons she addressed were chiefly those who lived on the fees and profits of the law ; and what they most loved were these, together with perquisites, compensations, queen's silver, honorariums, retainers, refreshers, sinecures, expedition money, copy money, blood money, and such like.

There seemed but little inclination in any of them to move. One said, “let well alone ;” another, that “he had the indigestion ;” a third, “he had the gout ;” a fourth, “that his wife was expecting her confinement ;” and a fifth, “that he liked no new-fangled changes.”

Whereupon Pilgrim thus spoke : — “Madam, I pray you to allow me to undertake this adventure alone. I doubt not

that any of these gentlemen were better able than myself to conquer this monster ; but even had they been more disposed to it than some of them appear to be, I should have wished to have attempted it single-handed : and this, I trust, proceeds from no rashness or foolhardiness on my part, but that I have had so long and so great an antipathy to this creature, of whom I have often heard, that I am unwilling to share the glory of destroying him with any one. And further, I have that confidence in the cause in which I fight, that if any other weapon be necessary than those I have, or any greater strength than that which I possess, I know it will be supplied me in the hour of need. I pray of you, then, Lady, and of these gentlemen present, to allow me to proceed alone, only giving me such instructions as may be needful for finding most easily and speedily the common enemy."

Here — for there were some of the better sort among the crowd — there was a loud and approving shout ; and I observed, that after a time, those cried loudest who had seemed most unwilling to share the danger, so base and time-serving is the bulk of mankind.

Turning with contempt from this vulgar applause, Pilgrim sought instructions as to the abode of Feudality, which were not difficult to give or to learn, and then once more addressed the Lady.

"Madam, I only wish your sanction and approbation of this adventure."

"That you have most freely, brave Pilgrim," said the Lady. "My best wishes attend you, and sorry I am that you should go alone, not from any distrust of you, but from shame of my retainers here."

On this, Pilgrim taking a crystal goblet which stood there dashed it into a clear stream which ran near to them, and thus drank to the Lady's health and happiness. He then departed, taking the road to which he had been directed. Nor were there wanting to him many good wishes and much unsubstantial shouting and praise, but other assistance he found not.

But I saw in my dream, that after he had left, there was much stir among those he had parted with. Many were

touched to the quick, and of the younger men some longed to join him; and for long years afterwards this single act stirred up the spirit and kindled an unextinguishable flame. It is thus that a noble action influences the better nature of man, though not always at the moment, and finds itself rewarded.

Pilgrim had not proceeded far when he heard the steps of one running after him; and turning, he saw a man who seemed to wish to join him, so he waited till he came up.

"Stop, brave Pilgrim," said the man, "I would speak with you."

Pilgrim. — "Let us walk on then, slowly. What have you to say?"

"My name is Hopeful," said the other; "and I would gladly join you."

Pilgrim. — "You are young, but I cannot on that account refuse your request."

Hopeful. — "Let me be useful to you if I am able. Let me carry your arms or your wallet, for my heart is with you?"

Pilgrim. — "Nay, dear friend, I accept your kindness with pleasure, but let me fully understand that you are not to interfere in this adventure that I am upon."

Hopeful. — "I would willingly join you in it."

Pilgrim. — "That is impossible, and if you persist in it we must part company at once. I am willing that you should accompany me to the borders of the monster's territory; but you are as yet unaccustomed to dangers such as this, and you must go no further. There you may await me if you will. I will leave you this wallet; if I do not return, fail not to scatter the seed you find in it, for they were given me by the immortal spirit of Truth. If I return, well and good, we can then talk further. These are the only terms on which we can proceed."

Hopeful. — "Well, dear Pilgrim, I will not oppose your desire: I wish to follow your steps, and to listen to your words. I hope you may allow me in time to share your dangers, and that you may find me of some use."

Pilgrim. — "I like your spirit, good Hopeful, nor can I

dare refuse your aid. It is you, and such as you, that must carry on the good work."

And now as they walked they came near a land of clouds and mists ; and Pilgrim, from the directions that he had received, knew that he approached the peculiar territory of the monster. Here, then, our traveller insisted that Hopeful should remain, which, after many remonstrances, and even tears, he agreed to do. Whereupon Pilgrim left him, and crossing the border, entered upon Feudality's land.

This monster had at one time possessed a much wider empire, indeed, not less than the absolute dominion over the whole country ; but this had gradually been lessened, and he had himself received several severe wounds, which had much enfeebled him, so that his power was becoming less and less every day. Over some, however, he had still great sway ; oppressing them with heavy and arbitrary fines, taking from them, on their deaths, their beasts and their chattels, and forcing them to pay heavy fees to his steward, and to take the law of their land from his book, which he kept under his own lock and key. He had, moreover, a body of priests who believed in his divinity, who, although comparatively small in number, made up in entire devotion and blind obedience for all other qualities. Many of this race had of late, indeed, begun to doubt the truth of his deity ; and some were for setting up the standard of defiance. But it cannot be denied that with many of them Feudality was slavishly worshipped ; and, as usually happens in such cases, his worst faults were most obstinately adhered to, and most loudly defended. The monster could not walk in a straight line, but always went either backwards or crooked and roundabout. His adherents declared that it was neither right nor possible to do otherwise ; that the roundabout way was the only way, the proper way ; that going on straight forward was very objectionable, and that progress was of all things to be avoided. Feudality had a tail of enormous length, without which he could not move. His priests declared that the longer it was the better ; and they compelled all who came within their reach to worship the long tail. In short, there was no deformity of the monster that they did not extol, and if any

one ventured to doubt their opinion, they were ready to fall on him at once, and make an end of him. Indeed, if any one even breathed that he thought a short tail was to be preferred, he was considered guilty of treason and atheism at the least. These men had a gibberish of their own: they talked of seisin and disseisin, feoffment, remitter, springing uses, executory devises, contingent remainders, beneficial owner, warranty, satisfied terms of years, and such like. They did not speak, in fact, the ordinary language of the country, and it was next to impossible to understand them; and, indeed, it was better not to have any thing to do with any of their words, for they often had a magical meaning, and might do a person a mischief if he so much as tried to use one of them. These last were, indeed, a narrow-minded race, all wearing King Precedent's collar exceedingly tight, and loving his rule. They lived, indeed, on words; they were their chief food, and old and young fed on them.

It is not to be supposed that Pilgrim was allowed to travel through the land without some opposition. Many were the fierce words and fierce looks, not, however, unmixed with dread, that were thrown at him; but, as he quietly proceeded onward, giving no offence that he could avoid, the opposition never came to blows, but confined itself to spiteful speeches, murmurings, backbitings, and revilings, which Pilgrim regarded not. And it must also be noticed, that that part of the inhabitants of this country, and even of the priesthood, who liked not Feudality, would probably have taken part with Pilgrim if he had been attacked, although they were not prepared to take any active steps against that monster.

Leaving these people then, their cries sounding in his ears, he came to a spot where the grass had ceased to grow, and all things were desolate and abandoned. Pilgrim had now warning that he approached the very abode of Feudality. This was an immense cave or hollow that ran far into the ground. Here the monster dwelt; and from hence issued forth, suddenly, to assert his power, and to breathe out that poisonous vapour of which the Lady Common Law had complained. On Pilgrim's approaching this cave he paused to reconnoitre it, and at first his eye was unable to pierce into its

obscurity, so dark and dismal did it seem. But by degrees he became accustomed to the want of light, and he warily entered it; and drawing his sword proceeded cautiously to explore its recesses. Nor was he long before he descried the monster, lying at full length, apparently sleeping on the ground. His body was swollen and brutal, having, however, a human form, but adding, withal, wings which were now closely folded to his back; and, as I have said, a tail coiled round his body. Pilgrim shouted to the creature to arise, but apparently he was not heard. On this he approached nearer, but at a certain point his enemy suddenly started up, and shooting out his tail, soon encircled him in its folds nearly pressing the breath out of his body. Thus Pilgrim, taken unawares, astonished in mind, and overpowered in body, had well nigh been pressed to death, for the tail had enfolded his right arm, and his sword had thus fallen from his grasp. His left hand, however, was at liberty, and he observed that the monster was blind on that side. As a last effort, then, he seized him by the throat, and despair lending him strength, he pressed with all his might on this vital part. Gradually the monster changed colour, slowly did he relax the many folds of his tail, till at last Pilgrim was able to throw him on the ground, and recovering his sword he dragged Feudality to the light of day, and would fain have dispatched him at once. But that creature, who, if he had had a quarter of his pristine strength, would have overpowered Pilgrim, was not thus easily to be destroyed. He shook himself from Pilgrim's grasp, and straddling across the road, stood dilated in all his force. Vomiting fire from his mouth, he rained a fiery sleet upon Pilgrim, which nearly overpowered him. His skin was withal so impenetrable that Pilgrim could make no impression with his sword. Watching, however, his opportunity, for the creature's movements were slow, Pilgrim threw all his remaining strength into one blow, and cut sheer off the monster's long and many folded tail. Whereupon, uttering a loud and piercing howl, Feudality spread out his wings, mounted into the air and fled the land, taking a northerly direction.

On this, Pilgrim uttered a joyful cry, and placing the tail

as a trophy on the point of his sword, he proceeded to find his way back. He had not gone far before he met Hopeful, who, alarmed by the long stay of Pilgrim, and hearing the unearthly shrieks of the monster, could no longer restrain his impatience, and had found his way to the spot.

The two then walked through the land, and were received with shouts of joy by those unhappy slaves, who had suffered under the cruel bondage of the monster, thus happily enfranchised. But there were not wanting scowls of hatred from many, whose idol had thus been maimed and driven away.

On the border of the land, Pilgrim delivered the trophy to Hopeful, begging him to proceed with it to the Lady Common Law, to whom he sent his duty and a respectful message, that before seeing her he wished to know how it fared with her sister, MADAME EQUITY, for whose territories he forthwith departed.

ART. VII. — REPORTS AND PAPERS OF THE SOCIETY FOR PROMOTING THE AMENDMENT OF THE LAW.

COMMITTEE ON COLONIAL AND NAVIGATION LAWS.

THE following reference was made to this Committee: —

“To consider the Law and Practice as to Colonial Judgeships, with respect to the removal of the Judges.”

REPORT.

By the term “Colonial Judgeships,” are to be understood Judgeships, not merely in *Colonies*, strictly so called, but in any dependency of the British Crown.

The law and practice as to those Judgeships, varies very greatly, not only in different dependencies of the Crown, but even in relation to different judges in the same dependency. There has been an instance, where the chief justice was

appointed "during pleasure," while the puisne judges of the same court held their offices "during good behaviour." Again, some judges are appointed by the local authorities absolutely, others by a local commission directed by a royal warrant, and others by royal letters patent. It would be difficult to follow out all these diversities into the correspondent variations of law and practice. What will here be considered is the power of removal of judges, who have originally gone, as judges or counsel, from the United Kingdom, and whose tenure of office depends on the home government.

And as prevention is better than remedy, it may be advisable to advert first to those measures which are most likely to preclude the necessity of resorting to so violent a proceeding as the removal of a judge from his office.

Speaking generally, it seems self-evident, that the principles which have produced in this country so pure and enlightened an administration of justice, would be equally efficient in the colonies. Those principles were distinctly laid down by the Crown, and confirmed by Parliament, in stat. 1 Geo. III. c. 1. s. 1., as follows :—

1. The independence and uprightness of judges are essential to the impartial administration of *justice*.
2. They are the best securities to the rights and liberties of the *subject*.
3. They are most conducive to the honour of the *Crown*.

It will be observed, that these principles were laid down in general terms, as containing truths alike certain in England and in all parts of the British empire: it is true that the statute applied them only to the superior courts of Great Britain; but though they are on the face of them no less applicable to our colonial courts, it is certain that, in respect to the latter, they have been too much lost sight of in practice.

The means adopted, in the statute, to carry the principles into effect, were these :—

1. The securing of *salaries* to the judges, during the existence of their commissions.

2. The securing of their offices during *good behaviour*.
3. The precluding of the Crown itself from removing them from office, without an address from both *Houses of Parliament*.

Subsequent acts have, moreover, sanctioned the granting of *pensions* for life to certain classes of judges, on their retirement from office; and to others, on the abolition of their offices.

No doubt the situation of a colonial judge, is widely different from that of a judge of one of the superior courts in England, Scotland, or Ireland. He cannot be compared with them in the importance of his office; but in some particulars his office is far more important than is generally supposed. In many dependencies of the Crown, the great mass of the population is different from us in origin, in religion, in language, and even, to a great degree, in laws. A judge born and educated in the United Kingdom is one main link of the bond which unites the dependency to the mother country, more especially when (as it often happens) the inhabitants have lived for ages under corrupt and despotic governments. In such cases, the native judges and law officers have too often partaken of the defects of their rulers; and the introduction of a purer system, under the control of an English judge, is hailed as a new era in the administration of justice. The executive government of the colony, if so disposed, may derive great benefit from an English judge or legal adviser. A wise governor will be anxious to keep within the bounds as well of the law of England, as of the local law; and in both respects, an Englishman, if competent to his office, will afford the governor the best security. The case of General Picton, at Trinidad, should never be forgotten: having no English lawyer to resort to, he could only be guided by the advice of the native judges; and hence he was involved in a prosecution which hung over him till his dying day. Colonial governors, indeed, do not always fully appreciate the value of such advice. Many of them are military men, and have a professional antipathy to lawyers; but the natives always look up with veneration and respect to an English judge, knowing that they will find, in his impartiality and

independence, the best safeguard of their rights and interests that the constitution of their government will afford. The stronger this impression is, the more deeply will they feel the removal of such a judge from office, on occasion of any disagreement between him and the other local authorities, as a calamity and an injury to themselves, weakening their attachment to the mother country, and disposing them to suspect the colonial minister of motives inconsistent with his public duty.

The preventive means, which have been found so effectual in England (where no judge has ever been removed from office since the passing of the statute above-mentioned), afford a clear indication of the course to be pursued in colonial administration.

1. As to *Salary*.—Colonies differ much in point of ability to remunerate the administration of justice; but that branch of the functions of government always bears a certain relation to the others. In England, successive statutes have always kept the salaries of judges in due proportion to those of other public officers; and it is to be observed, that the former have gone on *increasing*, whilst in many of our colonies the changes, for many years back, have been productive of gradual *diminution*, in most cases positively, or, if not so, at least relatively. Looking to the relative qualifications of a governor and a chief justice, the salary of the latter should be at least half as much as that of the former, more especially if the former be a military man, who consequently enjoys whole or half pay. In many cases, the judicial salaries are in a much less proportion to the executive; the worst effect of which, perhaps, is to make the governor look down on the chief justice as a very subordinate official, whose check on any illegal proceeding is resented as an embarrassment of the government, and a contempt of the governor's person and authority. Another most injurious effect of the inadequacy of judicial salaries is, that they afford no inducement to men of sufficient talent and eminence in the legal profession to proceed, at a great sacrifice of health, comfort, and interests, to a distant climate. It may be objected, that large salaries would tend to promote jobbing and

patronage, without regard to ability; but this might easily be obviated, by rendering it an indispensable qualification for appointment, that the nominee should be a person of a definite standing at the Bar in England, and should be recommended, as competent to the intended office, by the heads of his profession with reference to the character of the colonial laws. If these were founded on the law of England, the recommendation should come from the equity or common law judges; if, on the Roman law, from the judges in Scotland, or in our ecclesiastical courts.

2. As to the *Tenure of Office*. — The commissions of all judges, at home and abroad, were anciently in the same form, viz., “during pleasure.” The same causes which induced the change in England to “during good behaviour,” ought to have operated in regard to colonial judgeships. It is true, that in general practice (as stated by Lord John Russell in a despatch to Canada in 1839) the appointments of persons going from England, were considered and treated as appointments during good behaviour; but still the formal words were against the holders of office, and instances have occurred in which advantage has been taken of those words, contrary to all reason and justice. An able and honourable man cannot be expected to proceed, to a distant part of the world as a judge, unless he has the formal written assurance that he shall hold his office at the caprice or unjust will of no man; and there is no way to give him that assurance, but by a commission “during good behaviour.”

Nor should room be left for any misapprehension on the part of the local authorities, as to the true purport and intent of the words “good behaviour.” The governors, and, more especially their secretaries, should be emphatically admonished (in the words of Lord Erskine), that “no greater offence against the justice of any country can be conceived, than an attempt to confound and overbear its judges and ministers in the administration of the laws.” Such attempts are most commonly made in colonies by the government secretary¹, who, sheltering himself behind the governor’s

¹ See Observations on the Office of Colonial Secretary at the Cape of Good Hope, in the Report of the Commissioners. Parliamentary Papers, 1827. No. 282. p. 8.

responsibility, either indulges his own despotic disposition, or, perhaps, becomes the unconscious tool of the intrigues of his dependents. The secretaries, therefore, should be most distinctly warned, that any such attempt, on their part, would be instantly followed (if clearly and fairly proved) with removal from office. And in order to prevent their falling into error in this respect, a clear distinction should be drawn, in instructions from home, between the executive and judicial functions. In the ordinary administration of justice, it should be left to the judges to frame rules of procedure, which, if approved by the executive or legislative authority (according to the constitution of the colony), should become binding; and if not so approved, should be transmitted home, with the reasons of dissent. The appointment of sittings, and the distribution of judicial business, should be left entirely to the judges themselves.

The recommendations for promotion to the bench should be made (subject to certain fixed rules) by the chief justice, and for subordinate offices in the courts to the respective judges, the governor having only a limited power of deviating from such recommendations, and assigning his reasons for so doing to the Secretary of State. All interference with the judgments or other orders of the court should be strictly prohibited, except in cases of flagrant misconduct of the judges or officers, justifying their suspension. Neither should any impediment be offered to the courts, in giving publicity to their proceedings, or in executing their legal decrees and orders, with the like exception. The chief justice, or other principal judge, or the collective members of a supreme court, should have a right of reporting *directly* to the head of the government, on all judicial matters, as well as the right of calling meetings of the legal profession for deliberation on the like matters, and of requiring the necessary information from their own officers, or those of any other department.

In cases where the chief justice or president, like the Roman prætor, is invested with a summary jurisdiction, and particularly in controlling the police courts or other magistracies, whilst on the one hand such proceedings should as

much as possible be brought within definite limits, on the other hand they should be as little interfered with by the executive government, as the more ordinary exercises of the judicial functions.

Such summary authority, and oftentimes other special jurisdictions, are frequently assigned to governors, who are sometimes directed to act as chancellors, sometimes as ecclesiastical ordinaries, sometimes as commissioners in cases of piracy. All these arrangements are bad. The governor should have nothing to do with the administration of the law, but to exercise the prerogative of mercy; and even in that, he should first take into consideration the advice of the judges or law officers of the Crown.

3. *As to Removal from Office.* — If these and the like precautionary regulations be observed, and due attention be paid to the rank, precedence, and honours of the judges and law officers, it may be hoped that occasions for their removal from office may be as rare in the dependencies of the Crown, as in the mother country. In an extreme case, indeed, *removal* may be necessary; but *that* should only be the act of the home government. A governor may be authorised to *suspend* a judge; it being fully impressed on him that the step is one of the most serious that he can undertake, and that his resorting to it on slight and trivial grounds must necessarily lead to his own recal, and to consequences perhaps equally unpleasant to his advisers.

Supposing, however, that a case should arise, in which a governor might think himself bound to assume so heavy a responsibility, it is suggested that the following should be the course of proceeding to be followed: —

1. A specific and definite charge of misconduct, on the part of the judge, should be drawn up, and formally communicated to him.
2. A council should be assembled (or if there be no council in the colony, then a definite number of public officers), to take the charge into consideration, notice being given to the judge, that he may attend, if he should think fit.
3. Should the judge appear, he should have full means of examining and rebutting the proofs brought against him;

or not appearing, he should be at liberty to send in any document he might think proper.

4. The votes of the council (or other assemblage) should be taken, and *subscribed* by every member, and two thirds should be necessary for suspension.
5. In the event of such a majority, it should be publicly notified, that the judge is suspended *until further directions from the Secretary of State*.
6. A correct copy of all the proceedings and evidence for and against the judge, should be forwarded to the Secretary of State, together with any protest or address, on the part of the judge or others, against the proceedings; but no other charge should be included, than that to which the judge has had means of answering.
7. The judge should be furnished with means of proceeding to England, to defend his case in person.
8. The Secretary of State might dismiss the complaint; but should he not do so, the judge might bring his case, as of right, before the Judicial Committee of the Privy Council.
9. The Judicial Committee might decide on the *whole merits*, and award *costs*, either against the judge, against the governor, or out of the local funds.

Finally, the acts securing *pensions* to the judges in England ought, on all sound principles of policy, to be substantially applied to such colonial judgeships as are here considered. These acts are of two kinds: first, those which apply to cases of the *abolition* of office; and, secondly, those which apply to *retirement* from office. It has been held, that the words "during good behaviour" import an estate for life (4 Mod. 173.), and therefore when that estate is taken away, *by the act of the legislature*, in abolishing an office so held, the legislature has considered itself *equitably* bound to continue the money payment, even without exacting the performance of any duties in return. Such were the cases of the Welsh judges, the Commissioners of the Jury Court in Scotland, and of the Scottish Admiralty, and Commissary Courts. Gentlemen, who went abroad under commissions

"during pleasure," differed only technically from these judges. The real *understanding* of the parties, in both cases, was the same. They understood that the contract between themselves and the government was a contract *ad vitam aut culpam*: and so it was understood by the government; yet the *animus* of the contract has been evaded, and the *cortex verborum* has been deemed to authorise a far inferior allowance. To prevent such a defeazance of the true intent of an engagement, between the judge and the Crown, all judicial commissions ought certainly to be "during good behaviour."

The other class of statutes, namely, of those which provide for retirements from office, is very numerous, and includes not only home judgeships, but some that have been exercised abroad, particularly those in India, and in some vice-admiralty courts. It has been supposed, that colonial judgeships in general are sufficiently provided for by the Retiring Pension Bill (stat. 4 & 5 Will. 4. c. 24.), but on the contrary they are expressly excluded from that act (s. 15.), and that manifestly because the act was intended to remunerate the services of ordinary clerks and other persons, in stations far inferior to that of a judge. It seems advisable, therefore, that in any act for the better regulation of colonial judgeships, due provision should be made for the allowance of pensions, as well where the office is abolished and consequently the contract terminated by the act of the *grantor*, as where it ceases by the act or default of the *grantee*, on his retirement from office, or removal, on account of a supervening incapacity from age or illness.

COMMITTEE ON EQUITY.

THE following reference was made to this Committee :

To consider whether any and what improvement can be made in the present mode of proceeding in the Masters' Offices.

REPORT.

This Committee, on a former occasion, presented a report to the Society, which has been printed, containing various propositions for enabling the Masters of the Court to take

accounts of executors and administrators, and to make orders for the distribution of the assets of testators or intestates, without the intervention of the Court; but it having been suggested that, in consequence of the great delay and expense attendant upon proceedings before the Masters, according to the present system of procedure in their offices, any propositions, however important, which would tend to increase their duties, might be received with distrust by the profession and the public, this Committee have directed their attention to the causes of the present inefficient state of the practice in these offices, and to consider the best mode of removing the evils complained of consistently with the existing constitution of these offices.

Of the delays in prosecuting inquiries before the Masters, this Committee deem it unnecessary to offer any examples, it being notorious that references of any importance, where the parties are adverse, are seldom completed in less than two or three years; that, in many cases, the reports have not been obtained in less than seven or eight, or even ten years, after the decrees directing the reference: while in others the parties have been driven by the delays and difficulties in obtaining any final reports to abandon their claims altogether, or have submitted to heavy sacrifices, rather than incur the risk of so protracted and ruinous a litigation as seemed to be inevitable, in case the reference should be prosecuted.

The causes of these great delays are to be traced, principally, to proceeding by hourly warrants, and the non-attendance of the parties on the warrants so taken out, and to the necessity for frequent repetitions of proceedings, and going over the same ground, in consequence of the intervals that elapse between the warrants; and also to the practice of allowing evidence to be received at any time before the warrant, on preparing the Report.

With regard to non-attendance, a remedy has been attempted to be applied by the *orders 51. to 56. of 1828*, the Master being empowered by *orders 51. and 52.* to fix the times within which the parties are to take proceedings before him; by *order 53.* to proceed *ex parte*; it being declared by *order 54.* that any such proceeding *ex parte* shall not be re-

viewed unless he shall be satisfied that the party was not guilty of wilful delay or negligence, and then only on payment of all costs occasioned by his non-attendance; and by order 55. to certify what costs, if any, shall be paid by an absent party, in case he does not think it expedient to proceed *ex parte*. By order 56. the Master is also empowered, on the application of any party interested, to commit the prosecution of the decree or order to him, where the party actually prosecuting it does not proceed with due diligence. The powers given by these orders would seem to be sufficiently stringent to remove the evils intended to be guarded against, and yet they have notoriously failed of their object. Whether the failure is attributable to the lax mode of conducting proceedings in the Masters' Offices, or to the disinclination of the Masters to exercise powers of an apparently arbitrary character when the parties themselves agree to act upon a system of mutual accommodation, it is not necessary to inquire; but it cannot be doubted that some controlling power is wanted to compel a strict attention, as well on the part of the Masters as of the practitioners before them, to the rules necessary to be observed for administering justice in a speedy and satisfactory manner. The Committee consider that this end may be attained by assimilating the proceedings before the Master as nearly as circumstances will allow, to proceedings in the ordinary courts of justice; and for this purpose the following suggestions are submitted:

1. That each Master shall have a daily list of Causes, and that each cause shall be called on in its turn, and be proceeded with continuously, until the whole matter capable of being considered and disposed of has been gone through.

2. That the Masters shall fix a time for the disposal each day of matters of course; and after the same shall be disposed of, the Masters shall proceed consecutively with all such causes and matters as are not of course, and which shall be entered in the general list, giving priority, when it shall be necessary, to exceptions for insufficiency and objections for prolixity, impertinence, and scandal, in order that every such case may be disposed of with all reasonable despatch.

3. That to afford facilities for the attendance of counsel, the Masters' sittings shall be from eleven till five on alternate days,

and that no cause in the list, which is to be attended by counsel, shall be called on before three o'clock.

4. That not more than twelve causes shall be put in each day's list; and that the fifth, and three following causes, shall not be called on before one o'clock; and the ninth, and three following causes, shall not be called on before three o'clock, unless with the consent of the parties attending the reference.

5. That in the event of either party not being prepared to proceed when the cause is called on, he be ordered to pay the costs of the day to the other party, which, in case solicitors only attend, shall be fixed at two guineas; and in case counsel shall attend, at five guineas; unless a satisfactory reason be given for the default; and that on the taxation of costs relating to any proceedings in the Masters' Offices, the taxing master shall require copies of all entries of orders for the payment of costs made by the masters to be produced before him.

6. That a certain number of days in each vacation be set apart for disposing of causes in which counsel are engaged to attend.

7. That each Master shall keep a book, to be called "The Master's Entry Book," in which shall be entered, under proper dates as they occur, all hearings before him, specifying the cause or matter, and the solicitors, or parties and counsel who appear before him, and to which he is to add, in his own hand-writing, the points ruled, or opinions finally expressed by him, so that such book may at all times afford a clear record of the proceedings before him; and upon all occasions where it shall be required by either party, or by the Court or taxing Master, such books shall be produced in Court at any hearing before the Lord Chancellor, the Master of the Rolls, or the Vice Chancellors; and before the taxing master on any taxation in the suit.

8. That on the warrant for considering the decree, or at such other time as the Master shall deem it advisable, the Master shall fix a time within which each party shall be bound to complete his evidence, and that no evidence shall be allowed to be brought in after the expiration of the time fixed, except by special leave of the Master; and that if any order shall be made by the Master for enlarging the time so fixed, the same shall be subject to appeal.

9. That in cases where several inquiries are directed by a decree, and the Master shall deem it convenient to conclude one inquiry before proceeding with another, and shall express his opinion upon the result of such inquiry, or any subject connected with it in writing (the same to be entered in his book), no further evidence shall be received in relation to the inquiry, or subject,

so adjudicated upon, except at the request of the Master, or by leave of the Court.

It need scarcely be stated, that the principal object sought to be accomplished by the foregoing suggestions is continuity of proceedings; and this being so important a feature in the proposed amendments, the Committee deem it right to refer to the testimony given on former occasions in favour of this mode of proceeding by parties eminently qualified to form a correct judgment upon the subject.

In a publication relating to the Masters' Offices, published in 1841, which is attributed to one of the Masters of the Court, the writer says: "The power enjoyed by the suitors of making their own appointments is without doubt the reason why their appointments are so ill kept. They cannot value what is so easily obtained. It not unfrequently happens that of the warrants taken out for a *whole day not one is attended*. I do not believe that upon an average, more than two out of four by the counsel who have been engaged. It has been said in a tone of quasi complaint 'and the Master does not interfere.' The Master must earnestly wish that he could effectually interfere, for he is the principal sufferer. After having got up the case, he has to dismiss it from his memory, and perhaps a fortnight after to repeat the whole labour with no better result. But how is he to interfere? He cannot punish the defaulter by striking the case out of the paper, since in two or three days it will appear again. He may, it is true, proceed *ex parte*; but that will only lead to three discussions instead of one; and he seldom has this power; for if a solicitor finds it convenient to break his appointment, he generally sends word to his opponent, and they pair off together."

Master Lynch, in his speech in the House of Commons, on the 5th of August, 1840, which has since been published, states, that in a case before him, called "The Bury St. Edmund's case," where between seventy and eighty separate accounts were directed to be taken, the parties having proceeded for two days, six hours each day, the matter was gone through in the middle of the third day; whereas, if it had been proceeded with in the ordinary way of warrants,

the taking of the accounts would have occupied a year or more, and he adds: "There is no Master in the building who is not perfectly alive to the advantages of continuity of proceeding, and who, as far as in him lies, does not carry into effect such continuity; but until directed by a higher and competent authority—until the Master is directed not to proceed with a cause until he finishes the preceding one, he cannot, he ought not to do more than he does at present."

Mr. Field, a solicitor of extensive practice in the Court of Chancery, in his pamphlet on the Defects in the Offices, Practice, &c. of the Equity Courts, published in 1840, says: "I willingly admit that the fault of the delay rests greatly, in chief part, I would say, with the solicitors. There is a sort of feeling that any thing may be put off here; solicitors come and talk together a minute or two, get their attendance marked, and walk away again. It is considered a positive want of courtesy if you swear to your service and proceed *ex parte*. The Masters take no steps to compel the solicitors to be ready: they adopt *Mr. Lowe's* view, that it is the solicitor's own look out how fast he should proceed, and that a solicitor and the client are independent of the Court in this respect."

As an example to show the value of continuity of proceeding, *Mr. Field* refers to a case of pedigree that he was engaged in making out before the Master, where there were 400 parties whose births, deaths, &c. were to be proved; to accomplish which, according to the usual plan of warrants, would have taken a year, and this by continuous proceedings was finished in two days.

Mr. Winter, also a solicitor of large practice, in his evidence given before the Chancery Commissioners in 1824, states, that, in a suit which he mentioned (*Morgan v. Clarendon*), the solicitors of the parties must have walked backwards and forwards to the Masters' Office to attend warrants 1878 times, and thus wasted 624 hours, which is more than two months at 10 hours a day; 350*l.* was charged for the attendance on these warrants, and the cost of the warrants was 160*l.* 11*s.*

This Committee deem it unnecessary to lengthen their

Report with further illustrations; but they are satisfied there would be little difficulty in showing that half the time of the Masters is uselessly consumed by the present mode of conducting proceedings in their offices. Parties who have to attend warrants are seldom ready to proceed with the business appointed for at least ten minutes after the time appointed; and, assuming this to apply to only six warrants, one hour a day will be wasted in each office, and there being eleven Masters, the time so wasted is equal to two working days. To this is to be added the time occupied in reading papers over again after a long delay, the warrants that are not attended, and the reiteration of proceedings by the production of fresh evidence.

It has not been considered necessary to submit any direct propositions with the view of declaring the offices of the Masters to be open Courts, because it is generally admitted that they are already open to all suitors who may choose to attend; and the proposed plan of having daily lists of Causes will render it necessary for the parties whose causes are next in rotation to the cause in hearing to be in attendance, so that all the publicity which can be effected in the Offices as now constructed, will, it is conceived, be ensured.

This Committee deem it right to add, that they submit the foregoing Propositions with greater confidence, because the principle of continuous proceedings has received the sanction of the late Lord Chancellor of Ireland, Sir Edward Sugden; and the 1st, 2d, and 7th Propositions are similar in terms to the rules settled by that learned Judge for regulating the practice of the Masters' Offices in Ireland, and which rules are now in operation there, and have proved, as this Committee can vouch from the highest authority, most beneficial both to suitors and practitioners in the Irish Courts of Equity.

In conclusion, the Committee beg to state that it has been suggested that one mode of preventing the delays complained of would be by the Court fixing a time within which the Master should make his report; and one of the most experienced Masters of the Court, in his evidence before the Chancery Commissioners, appears to countenance such a pro-

position ; but the Committee have been deterred from recommending the adoption of this suggestion from the difficulty that must arise in ascertaining the proper time to be fixed, and an apprehension of the expense that might be occasioned by applications to extend the time.

COMMITTEE ON EQUITY.

THE following reference was made to this Committee : —

That this Committee be requested to direct their valuable labours to the consideration of whether any further alterations can be made in the whole system of the jurisdiction, practice, and constitution of the Masters and the Masters' Offices, with a view to obtain a more speedy and cheap administration of justice in the Court of Chancery.

PROPOSED REPORT.

The former inquiries directed by the Society and the comprehensive terms of the present reference have directed the attention of the Committee to the general subject of the administration of justice in the Court of Chancery, the nature and extent of the evils that are now complained of, and the means by which any material improvement may be effected.

In reporting to the Society the result of their investigations, the Committee cannot refrain from stating, in the first place, their strong feeling of the magnitude of the evils resulting from the present system. They are well aware that many of the complaints made by the public are founded, partly upon an erroneous impression of the nature of the duties which a Court of Equity has to perform, and partly upon an inability to comprehend how much hardship, uncertainty, and expense is necessarily incident to every tribunal of Justice. But after making every allowance for prejudice, ignorance, and exaggeration, the Committee are of opinion, that there is much real ground for complaint, that the Court of Chancery is not

¹ This paper was drawn up by Mr. Headlam, and was directed by the Committee to be read to the Society.

adapted to the present exigencies of society, and that the public have a right to demand measures for its material improvement. In making these observations the Committee beg to be understood as confining themselves to the constitution and practice of the Court. They have reason to believe that the rules and doctrines of equity are based on sound and enlightened principles of morality and jurisprudence, but the more perfect the theory, the more it is a subject of regret that its application to the affairs of mankind is clogged by a machinery so dilatory and expensive, that to suggest the idea of relief by the Court of Chancery is, in many instances, almost a mockery, even to those whose wrongs are of such a nature that they cannot be redressed by any other tribunal.

The proceedings in criminal cases, the rules of the Common Law, and the practice of the Courts that administer it have, for the most part, been understood and appreciated by the public, and it is scarcely possible to exaggerate the extent to which this knowledge has formed the character of the people and diffused among them accurate ideas of the meaning of right and wrong, as applied to the ordinary transactions of life. Whereas, the doctrines of equity have never been of interest or made familiar to the community. Ideas of mysterious uncertainty, indefinite delay, boundless expense, are associated in the public mind with the Court of Chancery, which, nevertheless, is the tribunal that has to adjudicate upon and protect the fortunes left by parents to their children, many of the respective rights of husband and wife, and various claims and interests arising out of the most delicate relations of social life.

It is well known, that however clear his case, no one can be advised to institute proceedings in equity, unless the amount sought to be recovered is considerable. In a petition presented to the House of Commons in 1840, and signed by the most eminent solicitors of London, the sum of 1000*l.* is mentioned as about the minimum. As the comparatively poor constitute a large majority of the community, it is no exaggeration to say, that the expense of present proceedings in Equity renders the Court wholly inapplicable to redress one-half of the wrongs

which properly come within its jurisdiction. The practical want of an accessible Court of Equity has a tendency to encourage fraud and dishonesty in those who are entrusted with the management and control of other people's property, and the habit of seeing such malpractices go unpunished cannot but have an injurious effect upon the moral character of the poorer classes.

The Government has been at considerable pains to provide Courts of Law for the settlement of such debts and disputes as exist between comparative strangers, and arise ordinarily out of dealings in trade. Can it be said, that it is not of equal or more importance, that there should be a cheap and speedy decision of such questions as come within the jurisdiction of Courts of Equity? The present defects, however, of the Court of Chancery are not confined to those cases where the small amount of the property renders its jurisdiction inapplicable. The spirit of commercial enterprise has called into existence a great number of Joint Stock Companies, having large funds at their disposal and exercising most important and extensive powers. Questions of very great difficulty are continually arising among the members constituting these bodies, which the Court of Chancery, by its general jurisdiction in partnership matters, has almost exclusively the duty of determining. Without entering into minute details on the subject, it will be universally admitted that neither in the administration and distribution of the property of companies of this description among their creditors, nor in the settlement of disputes or differences arising between the members themselves, has the practice of the Court of Chancery been satisfactory.

The Committee have thus stated, in the first instance, their impressions concerning the present defects of the Court of Chancery, in order to show the necessity for some alteration and improvement, and to prevent any proposition for a change being summarily dismissed on the ground of trifling difficulties in putting it into execution.

In this report this Committee intend to confine themselves to the two following important questions: — First, whether

the delay and expense now urged as serious objections to all proceedings in Chancery, are attributable either wholly or partially to the present mode of distributing the judicial labours of the Court; and, Secondly, whether by the creation of new officers, or by a different distribution of duties amongst existing officers, greater expedition and a saving of expense might not be effected.

One general observation concerning the Court of Chancery may, in the first place, be made, namely, that it has both to perform the duty of deciding upon conflicting claims and interests of the greatest magnitude; and that it is, at the same time, a vast and complicated machine for the management and distribution of property, in cases where either the disabilities of individuals (as infants or married women), or difficulties and defects in the devolution and transmission of property (as in the administration of the estates of deceased persons), render it necessary that recourse should be had to the powers of such a tribunal. The circumstance that the duties of the Court are thus of a compound character, partly judicial and partly administrative, produces this effect, that sometimes questions of the greatest difficulty arise, and require for their decision the utmost learning in the law and the most acute powers of judgment upon fact; at other times, all that is wanted on the part of the presiding officer is care, attention, and a knowledge of the routine practice of the court. This being the case, it is easy to understand why attempts should have been from time to time made to separate that portion which seemed to require the personal superintendence of the first law officer in the kingdom, from that portion which might be properly performed by men of inferior station and acquirements. So long as it was not only the theory, but the practice of the court that the Lord Chancellor himself should hear causes in the first instance, there might have been reasons which do not apply now, why it was desirable to withdraw from him as much as possible all business of a merely routine character, and refer it to a Master who, it may be observed ¹, originally

¹ See Mr. Spence's very valuable treatise on Equity, vol. 1. p. 383.

sat with the Chancellor at the hearing of a cause: but, inasmuch as Vice-Chancellors have been appointed, before whom and the Master of Rolls, all causes are now originally heard, and as there is little doubt that the Lord Chancellor will not be enabled, henceforward, to hear any causes, except by way of appeal, the question arises, whether the duties incident to the determination of a cause should continue to be divided between two judicial officers, each of them subordinate relatively to the Lord Chancellor, and one of them inferior to the other. The circumstance that the original hearing of every cause is now before a Judge inferior to the Lord Chancellor, may afford an additional argument why no portion of the judicial duty in a cause should be transferred to a still lower tribunal; but independently of this fact, there are strong reasons for contending that no division of one cause between two judicial officers, could ever be so made as to be advantageous to the suitor.

Perhaps the best mode of establishing this proposition will be by examining the present distribution of judicial labour between a Vice-Chancellor and a Master. Every cause is at present brought, in the first instance, before either a Vice-Chancellor or the Master of the Rolls, even though it may not be then in such a state that one single point in it can be determined. A reference is then made to the Master, in terms which are frequently a matter almost of course. When this is the case, it seems obvious that the original hearing is an expense wholly caused by the circumstance that there is a division of duty between the Judge and the Master. The decree first made does not decide a single question in dispute. It does not administer or distribute any property — all that results from it is a mere definition of what portion of the cause shall be transferred to another tribunal. After the Master has made his report (that is, in many cases after the whole cause has virtually been determined), a further hearing by the Court is necessary to give effect to his decision. In such cases the expense of the second, as of the original, hearing is created by the division of duties between the Judge and the Master. Had the Master been the sole judge, he would, when he made his

report, have been in a condition to decide the cause, and no further hearing would have been necessary.

The evil, however, is not confined to the mere transfer of the cause from one tribunal to another; but the office to which it is thus transferred, is in itself peculiarly inadequate to the proper performance of many of the duties thus cast upon it. The Master does not, in fact, proceed according to the forms, or possess the powers suitable and necessary for a Court which has to adjudicate upon disputed questions of importance, and administer property subject to various and complicated claims. He has little authority or control over the suitors who attend before him. He cannot usually make any order as to costs. He cannot insure diligence or activity in the conduct of a cause, even when the object of the suit is to vindicate the rights of a person under disability. No opportunity is provided for him of publicly commenting upon the negligence or misconduct either of the parties to the cause or their agents. That perfect publicity of proceedings, which in so many cases operates both as a wholesome restraint and an efficient stimulus, does not exist in the tribunal of a Master in Chancery. The Court above, though it scruples not to cast upon him the labour of investigating matters of dispute, and the difficult task of coming to a conclusion, seems to put no confidence in his discretion, and denies him almost all power of action. It may possibly be true, that by general orders, prescribing in particular instances different rules of practice, some improvement in the manner of conducting business might be produced; but if it be true that the Masters have not now that extent of discretion or degree of power and authority requisite for the performance of the duties they are called upon to discharge, then there is danger lest such general orders might do more harm, by still further multiplying restraints and thereby increasing the general defects of the system, than they could do good by the particular changes they effected.

With respect to suits for the administration of the estates of deceased persons, the Committee have before reported their opinion that the Master might exercise jurisdiction without any original hearing or reference from the Court above. The Committee still adhere to this opinion, and consider that such

a change would in itself be a great advantage, even though the Court of Chancery should remain in other respects as at present constituted; but they have been led in their present inquiry further to investigate whether there is any essential difference in principle between suits of this description and many others, and whether the same reasoning, which before led to the conclusion that a change of practice ought to be made with regard to these particular suits, would not establish the proposition that a much more general alteration ought to be effected.

In following out this inquiry this Committee have examined the forms of reference in various suits with the intention of discovering some general principle in the division of judicial duties between the Judge and the Master, and with the hope of thence determining whether there are any advantages in such a division to compensate for the obvious increase of expense it occasions. The Committee are wholly unable to lay down any general rule upon the subject. Forms of reference seem to have grown up and been adopted on almost every occasion when the Court has found itself in a difficulty, without its being much considered whether a transfer of the difficulty from one tribunal to another was the correct mode to be adopted for its solution. In some instances the form of reference is such as to transfer to the Master the whole cause, involving perhaps the decision of a most difficult question of law or equity. Should there be no appeal from his decision, he it is who virtually hears and determines the whole case; and the part performed by the Judge, as well at the original as at the subsequent hearing, is mere matter of form. This is the case in a suit for the specific performance of a contract, where the point in issue is the validity of a title. The cause is really heard by the Master, and both the original hearing and that upon further directions are, when the parties are satisfied with his decision, useless and expensive excrescences. Should they not be satisfied with his decision, an appeal (not in the most convenient form) lies to the Court above; and it is only by this expensive process that the opinion of a superior Judge can be obtained. There is then another appeal, viz. to the Lord Chancellor, and from thence

the case may be carried up to the House of Lords, and at any of these stages it may be referred back to the Master to review his report, and the same series of appeals may thereupon be repeated. Now it is obvious that every tribunal ought to be capable of ordinarily deciding to the satisfaction of those who sue before it, all cases that came within its jurisdiction, — appeals ought to be exceptions, as rare as possible, to the general rule — but the effect of the present system upon suits of the kind above mentioned, is, in the first instance, to transfer the cause to the most subordinate tribunal; and this transfer (in itself most objectionable) is effected by an expensive and dilatory process. From the court or office to which it is so transferred, should the case be one of any difficulty, an appeal is almost certain; and the suitor is liable to no less than three appeals before the material point in his cause is decided; but even here the mischief is not over, for after this succession of appeals the cause probably goes down again to the Master's office, and thence ascending to a hearing upon further directions, it comes to the termination of its career in the court from which it originally set out. It is only necessary to state these proceedings for the purpose of shewing that the practice now adopted in these particular suits, produces a division of judicial duties between the Judge and the Master, not founded upon any rational principle and productive of a great increase of delay and expense.

It must not be supposed that the application of these observations is confined exclusively to suits for the specific performance of a contract. There are many other cases in which all the real difficulty of the cause is transferred in the first instance to the Master, where the original hearing and that upon further directions may be, and frequently are, almost useless formalities, where there is the same certainty of appeal from the tribunal before which the cause is first heard, and the same liability to a series of successive rehearings. Thus taking two instances, by way of illustration, amongst causes recently heard. In one case the right to relief depended almost entirely upon the fact, whether there had been a binding contract between the plaintiff and defendant. The decree made by the Court, in the first instance, was a re-

ference to the Master to inquire whether any and what binding contract existed between these parties. In another case the bill was filed for payment of a specific legacy, the plaintiff alleging that the personal representatives had assented to his legacy, and that he was therefore entitled to immediate payment. The defendants denied that any such assent had been given, and contended that they were not bound to pay the legacy without an indemnity. Under these circumstances the decree directed a reference to the Master to inquire whether any assent to the legacy had in fact been given, and the Master was further to inquire whether the defendants were entitled to any and what indemnity.

References of this kind not only do not solve the question in the cause, but they frequently impose upon the Master a task of greater difficulty than the Court would have to perform, should it take upon itself the decision. For the Judge who directs the reference, exercises his ingenuity to frame inquiries upon every possible point that may be useful or necessary for the decision of the cause, and the Master has no option but to report fully thereupon. Whereas, should the Court endeavour itself to solve the dispute, it would frequently happen that the clear establishment of one point would preclude any necessity for further inquiry.

In addition to the evils already enumerated, as resulting from references of this nature, it may be observed that they tend to make the parties negligent in preparing their evidence before the cause is set down for hearing; for they rely upon having an opportunity afforded them for supplying all defects when the cause is transferred to the Master's office.

The Committee will now proceed to consider references of another description, which arise under the following circumstances. In certain causes the Court requires, before any decree is made, that particular facts should be proved for its own satisfaction, even though they are not disputed or in any manner in issue between the parties to the cause. Under these circumstances it is now the invariable practice to make facts of this kind the subject of a reference to the Master. Thus, when a suit is instituted on behalf of a class of children, the Court requires it to be established *in limine*

before the Master, that all the children constituting the class are parties to the suit : and no attention will be paid by the Court to any evidence on the subject however clear it may be. Though the parents may in their answer upon oath state all material particulars concerning their children, and though there may not be the slightest reason for doubting their testimony, still it is considered necessary to refer the matter to the Master, who himself not unfrequently makes his report upon the very evidence previously disregarded by the Court. References of this kind are of the most frequent occurrence ; for example, in a cause now pending the sole object was to obtain the opinion of the Court as to whether certain leasehold estates passed under words of general devise in a will, or lapsed to the next of kin of the testator as part of his personal estate. It was a family suit. All the particulars of the leaseholds were either set forth in the pleadings or disclosed in evidence. Every information concerning the members of the testator's family was before the Court in the answers of the several parties. At the original hearing the parties were all *sui juris* and desirous of having a decision of the Court upon the matter. There was neither doubt nor dispute upon any question of fact, and yet the Master of the Rolls felt himself compelled by the practice to direct an inquiry whether all the next of kin were before the Court, and as to all the particulars of the leaseholds in question. Assuming it to be true that facts of this kind should be clearly established to the satisfaction of the Court, and that to prevent collusion between the parties, the Judge should not necessarily be satisfied by the statements in the pleadings, still the Committee are of opinion that the practice which renders it necessary that the Court should, as to these particulars, disregard all ordinary means of proof, and rely on nothing except a report of the Master, is unnecessary and leads to great increase of delay and expense.

Upon other references the proceedings before the Master are subsequent to, and consequential upon the decree, or involve in themselves the very relief that is the object of the suit. This is the case in a bill simply for an account, or for the administration of the estate of a deceased person, or for

the management of the property of an infant. The Committee believe that upon references of the last kind much of the duty is at present done by the Master's clerk. Whenever this is the case, there seems no reason why such duty might not be fitly transferred either to some subordinate officer, expressly constituted for these particular functions, or to an official bearing the same relation to the Judge that the Master's clerk bears to the Master.

Many other instances might be mentioned of the evils produced by transferring causes by means of references to the Master; but the Committee consider that the above are quite sufficient to illustrate the object they have in view, in pointing out the vexatious delay and expense occasioned to suitors by this practice. One general objection to all references seems to this Committee so important as to require special notice. It is that the Judge who orders the reference, has not forced upon his attention the great expense occasioned by the minute inquiries he directs. He disposes of the case (as it is called) by transferring it to another tribunal, relieving himself from all responsibility by considering that he only adheres to an established practice. Again, though the Master to whom the case is transferred, in the course of his inquiries is made acquainted with the expense and inutility of many of the matters referred, and also, perhaps, in some instances with the insufficiency of the reference, yet he has no power to obviate the evil. It is his sole duty to follow the directions imposed upon him by the reference; and there being no discretion vested in him, he necessarily feels no responsibility. Lastly, when the cause comes back to the Court upon the Master's report, and on further directions the difficulties which have attended the inquiry are not apparent on the face of the report; but should the Master have deviated in any degree from the literal terms of the reference, the Court exhibits but little sympathy with his embarrassments, and probably by referring it back to him to review his report, casts an implied censure upon his conduct. The result is, that neither Judge nor Master feels that any blame attaches to himself when cases of gross injustice are mentioned respecting the Court of Chancery. Whereas, should each cause be

heard throughout by one Judge, he could scarcely fail to become cognizant of every case of hardship as it occurred, and it would not be difficult for him to discover how far the evil was fairly to be attributed to any defect in the court over which he presided. Upon him would properly then rest the responsibility, should such evils continue without redress, and thus a spirit of continual and progressive improvement would be generated.

As a remedy for these grievances the Committee recommend that in every cause, all disputed questions, whether of fact or law, should be decided by the Judge before whom the cause is set down. That in every cause in which, according to the present practice, the Court, either for the protection of absent parties, or for other reasons, requires evidence to be given on facts not in dispute, the same Judge should himself examine and decide upon such evidence.— In this manner the purely judicial duties of the Master would be entirely superseded by the Court.

With respect to the administrative duties now performed by the Master, the Committee are of opinion that many of them might be more suitably performed by officers of inferior station. For instance, an officer might be appointed to manage and superintend the sale of estates. Professional accountants might be employed to take accounts. Such subordinate officers should act under the Judge, and when any question of difficulty arose, the suitors should have the privilege of obtaining his opinion, but, subject to this right, the inferior officer should have the full power of finally settling the matter submitted to him. The course thus recommended is only an extended application of the principle which has been sanctioned and acted upon in the taxation of bills of costs. The Taxing-Masters are officers created for one particular purpose. No subsequent order of the Court is requisite to give effect to their decision. They do not merely report, but they are made capable of carrying into effect and completing the matters submitted to them. This seems a division of labour, as between them and the Court, sound in principle, and as far as experience can at present testify, satisfactory in practice.

A certain portion of the purely administrative duties of the Court might thus be satisfactorily transferred to officers created for defined and particular purposes ; but as to such part as could not so be transferred, the Committee are of opinion that it ought to be undertaken by the Judge himself. By adopting the course now recommended, every cause would be continually under the superintendence of one Judge, who would have such an efficient body of assistants in the shape of Taxing-Masters, Accountants, Registrars, and other officers, as would prevent his time being employed in duties of a humiliating or trifling description. The Committee may refer to the practice which now prevails in administering the estates of bankrupts and insolvents, as affording in some respects an illustration of the nature of the change thus proposed. The Commissioner or Judge in bankruptcy has complete superintendence of a case throughout. He is assisted by official assignees and other officers, created for particular purposes ; but there is no division of judicial duties between him and any other officer, at all resembling that which now takes place between a Judge in Equity and a Master. The result is, that whatever opinions may be entertained of the merits of the bankrupt or insolvent laws themselves, no complaint is made of delay or expense in the manner in which they are administered.

It now becomes the duty of this Committee to show how the changes they recommend, might practically be carried into effect. An alteration merely to the effect that the Judge in the cause should himself work out what are now the subjects of reference (leaving the practice in other respects unaltered), would not be attended with any great difficulty, though there might be an increase of expense. The Committee believe that a change, even to this extent would do good, and remove some of the evils before enumerated, but they are also of opinion, that if the present division of duties between the Judge and the Master were abolished, further most material improvements might be effected.

In the first place, with regard to suits in which the Court previously to making a decree now requires a report as to matters not in dispute, there seems no reason why the plain-

tiff should not at the hearing bring forward sufficient evidence to satisfy the Court itself. It may be observed, that the Master is not now, on references of this (or indeed of any) description, an active agent to make inquiries or collect evidence. This duty devolves upon the plaintiff, or person conducting the cause, and the Master merely exercises his judgment upon the evidence when collected, makes his report accordingly, and the Court acts upon his decision. There would therefore be no hardship or extra trouble or expense on the plaintiff were he compelled to collect or prepare his evidence for the Court, instead of for the Master. The Counsel who prepares the pleadings knows what facts would, according to the existing practice, be made the subject of such preliminary inquiries, and could, therefore, advise the plaintiff what evidence it would be necessary, under the proposed system, for him to bring forward at the hearing.

The Committee therefore think that a general order might be made to the effect, "That in all causes in which, according to the present practice, the Court requires a report on certain matters previous to any decree, it shall hereafter be the duty of the plaintiff, by affidavit or otherwise, in such form as is now permitted in the Master's office, to lay before the Court, at the original hearing, sufficient evidence on such facts, and that in the event of the plaintiff neglecting to produce such evidence, he shall be liable, at the hearing, to have his bill dismissed with costs. Or the Court, in the exercise of its discretion, shall allow the cause to stand over, upon such terms with respect to costs as may be just, in order to enable the plaintiff by further evidence to remedy the defect."

So, also, it might be made the duty of the plaintiff to advertise for next of kin before the hearing of the cause, in those cases where, according to the present practice, the Master is directed so to do. The only necessary alteration in the form of advertisement would be to substitute a Registrar of the Court, or some other officer, as the person to whom claims should be addressed. Proof that such advertisements had been duly issued, would be a necessary part of the plaintiff's case at the hearing; and should any claim be sent in, the bill would be amended by making such claimants parties. If the plaintiff denied their title, the fact of their relationship to

the intestate might be tried by the Court, like any other issue between a plaintiff and defendant. By such orders as these, varied as to particular cases, the Committee believe that all cases might be brought before the Court, supported by such evidence as would render unnecessary any inquiry preliminary to the decree. When at the hearing the Court should be of opinion, that sufficient proof was tendered by the plaintiff upon all facts which are now made the subject of a preliminary reference; a declaration to that effect might precede the decree, and operate as a guide to the Court and the parties, on subsequent proceedings in the cause.

In suits where the sole or primary object is to obtain the decision of the Court upon the construction of a will, not only preliminary inquiries are now directed, to ascertain whether all the persons interested are made parties to the suit, but it is also a practice almost invariably established, that no decision upon the will shall be made until the general accounts of the testator's estate, or of the particular fund or estate which is the subject of the suit, have been taken, the rule being, that unless the Court can administer and order precise payment of the funds in question to the parties declared entitled thereto, no decision upon the construction of the will should be given. This practice was animadverted upon by the Commissioners in 1826, who suggested that the Court should give an opinion upon the construction of a will, without either the account having been taken, or even a bill filed, upon a simple petition by the executors. These suggestions have not been acted upon, but, the Court has adhered to its former practice, proceeding, apparently, on the principle that a Court of Equity ought in no case to interfere, unless finally disposing of the whole matter, it can do what is called complete justice, and under the fear lest, if it were to give a decision on the construction of a will, without ordering the accounts to be taken, the legal owners of the fund might be harassed by a multiplicity of suits. There is, no doubt, some force in this reasoning; but the Committee are, nevertheless, of opinion that the objections to altering the present practice are more theoretical than real, and that the grievance of the present strict rule is very serious and practical. The executors or administrators might very well be left to take care of their

own interests; and, should they not insist upon the accounts being taken, there seems no reason why the Court should interfere on their behalf. The decree on the construction of the will would not prejudice, in any way, the rights of creditors, as no distribution of the estate would be ordered under the sanction of the Court. On the whole, the Committee are of opinion, that if neither the executors, nor any of the parties interested in the estate, absolutely insist upon the accounts being taken, and if a knowledge of the amount of the funds in question is not necessary, to enable the Court to form its opinion upon the construction of the will, then that the accounts ought not to be taken, whether the persons interested in the estate are *sui juris* or under disabilities.

In a former part of this Report certain cases were mentioned as illustrations of the practice, now very general, of transferring from the Judge to the Master the task of deciding upon a matter of fact in dispute. The relative rights of the different parties depended upon the decision as to these facts, so that the reference was virtually a transfer of the whole cause. Doubts may exist whether such references as these are not of recent introduction, and whether they are not inconsistent with the proper practice of the Court. They can only be justified on the supposition that there are such defects in the machinery for taking evidence, and in the system of pleading, as to prevent the parties laying their case fairly before the Court at the hearing. If the system of pleading or the manner of taking evidence be really bad, attention should be given to discover a remedy. If, on the other hand, there are no objections either to the one or the other, then the Committee are of opinion that the parties should be obliged to come to the hearing of the cause with all their evidence upon disputed facts fully prepared, and the Court should decide (as it best can) upon the case as it then appears. In special cases, and upon particular terms as to costs, the Court might allow a cause to stand over, with liberty for additional evidence to be adduced; but the Committee think that this indulgence should be cautiously granted.

The Committee have before stated the defects in the present mode of conducting suits for the specific performance of contracts, they will now show why they think that the changes

they suggest would remedy the evil. In causes of this description generally the only real point in issue is, whether a certain person has a good title to a particular estate. Now it undoubtedly often happens that difficult questions both of law and fact arise in deciding upon the validity of a title. The same is, however, true of many other issues that occur in equity. There is no essential difference in principle between an issue concerning the validity of a title and many others. If the tribunal before which the trial is to take place, be competent — if the forms of pleading and the manner of taking evidence be good, there can be no reason why this particular cause should not, like other causes, be decided on the original hearing. The conduct of the parties previous to the institution of the suit, would be before the Court. If the title should be good, the time when it was established would appear in evidence. So that there seems no reason why the Judge should not, at the original hearing, be in a condition to exercise his discretion with respect to the costs, and thus finally dispose of the cause. Comparing such a method of deciding causes of this kind with the present practice before explained, it is scarcely possible to exaggerate the saving of time and expense which would result from the proposed change.

The committee might well under the comprehensive terms of the reference have proceeded to investigate the truth of other complaints that are made against the Court of Chancery, and considered whether the forms of pleading, the method of adducing evidence, and the machinery of the Court are not susceptible of material improvement. They have, however, purposely abstained from making those inquiries, not because they think that there is no hope of any beneficial change in these several respects being made; but, because they are of opinion that the present system of the division of duties between the Judge and the Master enters so deeply into the constitution of the Court, and is an objection of so fundamental a character that a remedy of this defect ought to precede every other change, and that all improvements in minor matters ought to be made with reference to the system which shall grow up when the Masters' offices are abolished. Great, however as the Committee believe might by such

means as these be the improvement in the existing Court of Chancery, they are not prepared to say, considering the very small amount of property involved in many cases requiring the intervention of Equity, and the private domestic character of the subjects of dispute, that any extent of change can render the Court so accessible as that one central tribunal shall adequately adjudicate upon every case requiring its intervention, in all parts of the kingdom.

The Committee have not stated any thing concerning either the formation of local courts of equity, or any other means by which equity as well as law might be brought home to the poorer classes; because they think that, before any scheme of this kind is brought forward, the central and model tribunal should be made perfect.

The Committee wish it to be clearly understood, that they have stated the application, in particular instances, of the alterations they suggest, not for the purpose of precisely laying down what ought to be the present practice in these or in any other cases, but for the purpose of showing the benefits that might reasonably be expected to arise from an alteration of the present system, by which the proceedings in a cause are divided between the Judge and the Master.

They are of opinion that it would be inexpedient to attempt by a series of general orders to provide for all the improvements that it would be desirable to adopt when causes should be heard throughout by one Judge. In many cases, orders and decrees more convenient than the present, and better adapted to the change of practice, would suggest themselves. Different rules concerning the manner in which applications should be made to the Court, would from time to time be found expedient. No ingenuity could have preconceived and laid down the present elaborate system of Chancery practice, and the Committee think that the same will hereafter be found true of the system that would grow up upon the proposed abolition of the Masters' offices. It would be absurd to suppose that so important a change could be effected in the Court of Chancery without some difficulties having to be overcome; but the Committee do not foresee any evil that could result to the suitors from the imposition upon the Judge of the duties now performed by

the Master; and the other changes of practice suggested in this Report, might be gradually introduced, as the safety and advantage of each should be separately established and rendered apparent. In conclusion, the Committee take the liberty of saying, that so far from the proposed change lowering the position of the Judges in Equity, they are of opinion that, whoever may be the persons who first preside in the Courts of Chancery after such alterations are effected, they will have a better opportunity of employing their learning and ingenuity in improving the administration of justice, than has fallen to the lot of any man since the time when the doctrines and practice of Equity became moulded into a settled and established system.¹

¹ We are very glad to be able to present to our readers the above documents, which relate to Chancery Reform. While they are passing through the press we have become acquainted with a remarkable series of alterations which have been made in the law in the State of New York in the beginning of the present year, of which an account is given in the 'Law Reporter' for March last; a highly respectable monthly work, which is published at Boston, and numbers among its contributors many of the most eminent names in American legal literature, as the late Mr. Justice Story, Professor Greenleaf, and others. The article to which we allude gives an account of what it calls "the Entire Reorganization of the Judicial Establishment of the State of New York." "We cannot do better here than first to state the evils complained of; then give the article on the subject, as adopted; and, lastly, call attention to the alterations effected. The great evils complained of in the former system of the state were, first, the Court of Errors. Its cumbrous character, its political complexion, resulting from its identity with the Senate, and the consequent uncertainty of its decisions, had made it very unpopular with the great body of the profession. The Court of Chancery had become, perhaps, still more disliked, from the concentration of power in a single hand, and from the intolerable delays to which *sui ors* were subjected. "What matters it," is reported to have said the Chancellor, "whether this cause be heard this term or not? I cannot look at the papers *for two years to come*." The admission was candid, but fatal to the Court. The Supreme Court was disliked, on account of the separation of its judges into Judges of law and Judges of fact; and the evils resulting from this sequestration of the higher Judges from juries and witnesses, and the active business of the profession; while the Common Pleas of most of the counties had become pretty notorious for incompetency."

"In fact," the writer continues, "the entire judiciary of the State is utterly demolished and reconstructed. Court of Errors, Court of Chancery, Supreme Court, Common Pleas, are utterly and entirely blotted out, and a new system is formed out of new materials. The justices of the peace alone are left. We may examine it first in regard to the organization, and next in regard to the mode of creation and tenure of the incumbent. The Court of Errors gives way to the Court of Appeals. *The Court of Chancery ceases to exist entirely*, and its

powers are given to the Supreme Court. *Chancellors, Vice-Chancellors, Masters, and Examiners, all end their being together.*

"The Supreme Court is retained in name, but completely altered in its character, divided into eight district Courts, administering the law mainly in their localities, and the old *Nisi Prius* system is restored. The County Courts are reduced, as far as litigation is concerned, to a mere supervision of the Justices' Courts, and the duties of the Surrogate are conferred on the county Judge. Fees are abolished so far as they 'are received to the use of the officers.' The tenure is equally altered. The term of all the judges is limited to eight years, and they are all made elective."

After objecting to the Judges being elective, he continues: "In other respects, we take pleasure in saying, that, in our judgment, the new system is an immense improvement on the last. The abolition of fees closes the door on a host of delays and abuses, and the restoration of the old *Nisi Prius* system gives, in our opinion, the only means of obtaining a complete judge. As to the union of Law and Chancery, sound legal minds will greatly differ. Few will fail to regret the extinction of the ancient title of Chancellor, and some will bestow a sigh on the Masters—those *collaterales et socii cancellarii*. Indeed, if the jurisdictions of law and equity are to be kept distinct, clearly it is best they should be administered by different functionaries. But if we look to the scientific administration of justice, we think we can see that the State of New York has an opportunity now to place her jurisprudence on a basis of simplicity and order, which she has never before enjoyed. The 24th section of the judiciary article runs as follows:—

"§ 24. The Legislature, at its first session after the adoption of this constitution, shall provide for the appointment of three commissioners, whose duty it shall be to revise, reform, simplify, and abridge the rules and practice, pleadings, forms and proceedings of the Courts of Record of this State, and to report thereon to the Legislature, subject to their adoption and modification from time to time."

"We see nothing to prevent these commissioners, by a judicious but bold modification of the forms of action, from putting an end at once to all distinction between law and equity, where there is now a concurrent jurisdiction; and by a very little (though certainly very much considered) legislation, it would be equally practicable to give all the equity powers to the Common Law Courts, and thus put an end for ever to the discord that prevails in consequence of the existence of the separate tribunals.

"The constitution contains the following provision on the great subject of codification: 'The Legislature, at its first session after the adoption of this constitution, shall appoint three commissioners, whose duty it shall be to reduce into a written and systematic code the whole body of the law of this State, or so much, and such parts thereof, as to the said commissioners shall seem practicable and expedient.' A provision, which, if it be wisely carried out, and the task be entrusted to competent hands, may be productive of very important results; and which, on the other hand, if committed to unwise or insufficient persons, may throw the jurisprudence of the State into the most admired disorder. In this, indeed, as in many other particulars, the new constitution depends so much on the practical sagacity and discretion with which its provisions are carried into effect, that it is utterly impossible to predict beforehand the effects that it is to produce."

These, it will be admitted, are sweeping alterations, and however much such sudden changes are to be deprecated, yet it should be remembered, by wise and prudent legislators, that they have taken place, and may take place again. Nor should it be forgotten that a proposition very much in the terms of that carried by the Senate of the State of New York was lost in the time of the Commonwealth only by the casting vote of the speaker. For a very instructive account of the Chancery Reforms of that period, see the Third Volume of Lord Campbell's Chancellors. We need not remind the reader that Sir John Copley, when attorney general, in bringing forward his plan of Chancery Reform in 1826, pointed out as a reason for preserving the distinction in this country between law and equity, that we had been followed in this respect by several of the North American states; and now we find them abandoning this distinction. We do not mention these things as alarmists, but in order that the necessary alterations being made in time, the most venerable institutions of this country may be preserved from destruction. — Ed.

ART. VIII.—THE LAW OF SETTLEMENT.

The Minutes of Evidence taken before the Select Committee of the House of Commons appointed to inquire into the Operation of the Law of Settlement and Poor Removal in March, 1847.

THE power of removing poor persons who have committed no offence from the places which they may have selected for their residence, and of punishing them on their return, is an undoubted violation of their liberty, and bears the aspect at first sight of a dangerous interference with that free circulation of labour which is a primary condition of the development of a nation's resources. The exercise of such a power can only be defended on the grounds that the man who subsists on the bounty of others cannot fairly dispute their right to choose the place where it shall be administered, and that the advantages to the public more than outweigh the inconvenience to himself and the cost of his removal. Assuming removals to be necessary in some cases, it is obvious that a law which authorizes them should guard against any removal taking place by which the public is not distinctly benefitted, and should endeavour to combine the greatest possible public benefit with the greatest benefit, or the least inconvenience to the pauper. The public benefit aimed at must be the distribution of pauperism more equally and fairly throughout the country than it tends to distribute itself, and the adjust-

ment of the burthen so as to be least felt by the nation at large; the interest of the pauper requires that he be removed to the place where he is most likely to thrive, and to which consequently his inclination may be supposed to lead him (next at least to the place from which he has been removed), and is in most cases coincident with that of the public, who are relieved from a burden by his re-attaining independence.

A wise law, moreover, would endeavour to attain, or approximate to these objects by the simplest means, leaving as little room as possible for the arising of perplexing and litigable points.

It is proposed shortly to inquire whether the present law of settlement attains these objects as far as it is practicable, and if not, what alteration is required; and this inquiry may be somewhat assisted by a glance at the origin and progress of this branch of the law.

In the earliest times there seems to have been a common law obligation on parishes to support their own poor. We find reported as among "the ordinances of the ancient kings" (before the Conquest), that "the poor should be maintained by parsons, rectors, and parishioners, so that none of them should die for want of sustenance."¹ In point of fact, however, they seem to have been almost exclusively maintained by the clergy up to the dissolution of the monasteries.

In ancient times a third of the tithes was expressly appropriated to this purpose, the other two thirds being employed for the maintenance of 'religion' and of 'the church' respectively; and although after the second Lateran council, in 1139, by which tithes were appropriated to parishes, no part of them was deemed a fund to which the poor had a right to resort, the clergy seem to have considered the poor as their peculiar charge, and supported them, as they could well afford, out of the enormous revenues of the church (calculated at the time of the Conquest at one third, at the time of Richard II. at a fourth, and at the commencement of the Reformation² at a fifth of the revenues of the kingdom), aided by the effects of persons dying intestate, which were vested in the

¹ Mirror by Horne, c. 1, s. 3.

² 2 Burn. Ecc. Law, tit. Monasteries, Nolan's Poor Laws, vol. i. p. 4.

ordinary, and the contributions and bequests of the charitably disposed, or those who wished to purchase the prayers of the poor; but as far as the bulk of the parishioners were concerned, the obligation supposed by the law to be cast upon them not being enforceable by any known means, was very generally neglected; so much so, as to give occasion to Blackstone to observe, that the poor seem to have been left to such relief as the humanity of their neighbours could afford them.¹ The indiscriminate manner in which alms were commonly distributed at the monasteries and churches raised a class of professional mendicants, who were in the habit of wandering about the country, probably in search of the localities where the greatest amount of alms was to be obtained with the least inquiry into the character of the applicants, and some localities found themselves overrun with swarms of beggars and vagabonds. The first enactment passed to obviate this evil was the 12th of Rich. II. c. 7., which directed all beggars to repair to the parishes where they were born, and "there continually abide during their lives." Other statutes followed during the succeeding reigns denunciatory of rogues, vagabonds, and "sturdie beggars," requiring them to remove to the places of their birth, or where they were best known², or had made their abode for three years³, under penalties in accordance with the penal code of those times, such as whipping, branding, and binding as slaves for life, cutting off "the gristell of the right ear;" and on supposed incorrigibility, death as a felon⁴, the severity of which in a great measure defeated their operation, but which nevertheless continued in force till the reign of Charles II.

On the dissolution of the monasteries, the pressure of pauperism on certain districts became more acutely felt by the public, and more effectual enactments were passed to equalize the burden in the reigns of Hen. VIII. and Edw. 6.⁵

Stat. 1 Edw. VI. c. 3. is the first which distinctly confers the power of removal. After directing vagabonds (declared

¹ Black. Com. 19th Ed vol. i. p. 359.

^{*} 11 Hen. 2. c. 2.

² 19 Hen. 7. c. 12.

⁴ 19 Hen. 7. c. 12.; 27 H. 8. c. 25.; 1 Edw. 6. c. 3.; 5 Eliz. c. 3., &c.

⁵ 27 Hen. 8. c. 25.; 1 Edw. 6. c. 3.

slaves) to be sent by *justices* to the place of their *birth*, it required, under penalties, mayors, and other town authorities, to remove other descriptions of poor, "whose coming together and making a number," it recited, "doth fill the streets and highways of divers cities, towns, markets, and fairs, and who, if they were separated, might easily be nourished in the towns and places wherein they were born, and had been most conversant and abiding for the space of three years."

In the 14 Eliz. c. 5., birth and three years' residence were recognised as "settlements," — justices of the peace being required to register all aged and impotent poor born, or for three years resident in their several districts, and *settle* them in convenient habitations.

A compulsory system of levying poor rates was established by a series of enactments¹ ending in the much quoted but little read 43 Eliz. c. 2., the purport of which may be shortly stated as directing the levy of poor rates in the manner now in force, and the application of them to the support of such of the aged and impotent poor who could not be maintained by their relations, the setting of the able-bodied of all ages to work, and the binding of apprentices under certain circumstances by churchwardens and overseers.

The law of removal and vagrancy, however, remained long in a very unsettled state, practically conferring on the magistracy an almost arbitrary power over the poor, whom they removed or whipped from tything to tything², or branded or imprisoned very much at their discretion. The judges are reported to have endeavoured to check this power by coming to a resolution in these words: — "No man is to be put out of the town where he dwelleth, nor be sent to his place of birth or last habitation, but a vagabond rogue, nor to be found by the town except the party be impotent, but ought to put themselves to labour, &c.³;" and subsequently (in 1631) they endeavoured to define more clearly what description of poor were liable to removal, by replying to a query "What is accounted a lawful settling in a parish, and what is not?" "Generally this is to be observed, that the

¹ 5 Eliz. c. 3.; 14 Eliz. c. 5.; 18 Eliz. c. ; 39 Eliz. c. 3.

² "Poor Tom, who is whipped from tything to tything, and stocked, punished, and imprisoned." — *King Lear*, Act 3. Scene 4.

³ Lambard's *Eirenarcha*, ed. 1819, b. ii. c. 7.

law unsettleth none who are lawfully settled, or permits it to be done by practice or compulsion, and every one who is settled as a native householder, sojourner, an apprentice or servant for a month at least without a just complaint made to remove him, or he shall be held to be settled.”¹

Such was the state of the law when the 13 & 14 Car. II. c. 12. was passed, on which the present law of settlement is based, the preamble of which thus expresses the evil it was designed to meet:—“Whereas by some defects in the law poor people are not restrained from going from one parish to another, and therefore do endeavour to settle themselves in those parishes where there is the best stock, the largest commons or wastes to build cottages, and the most woods for them to burn and destroy, and when they have consumed them to another parish, and at last become rogues and vagabonds, to the great discouragement of parishes to provide stock when it is liable to be devoured by strangers.”

This act conferred on justices the power of removing “within forty days any person *likely* to become chargeable coming to settle in any tenement under the yearly value of 10*l.*,” “to the parish where he was last legally settled as a native, householder, sojourner, apprentice, or servant, for the space of forty days at least,” subject to an appeal to the quarter sessions.

As the distinction between irremovability and settlement was not at that time thought of, this statute was held to confer a settlement by mere residence of forty days, which, however, was soon rendered difficult of acquisition by certain notices being required, and was finally abolished by 35 G. 3. c. 101. In addition to this, settlements were held to be gained by birth, by renting a tenement above the annual value of 10*l.*, and by apprenticeship or service, coupled respectively with forty day’s residence.

It may be here remarked, that at about this time, and for long afterwards, a settlement seems to have been considered by the legislature and the judges as an advantage to the poor man, as giving him a clear right of relief somewhere, which,

¹ Dalton’s Country Justice, tit. Poor, 26.

notwithstanding the requirements of the common and statute law, he does not appear to have been sure of without¹, and as exempting him from the hardship of removal. We find expressions such as "the benefit of a settlement," "it would be hard to deprive the pauper of the only settlement he has," and the like; and with these views the judges have from time to time added to the number of settlements by decisions, without sufficiently considering, that if a settlement conferred irremovability from the place where it was gained, it afforded an additional ground of removability from every other to which the pauper might go, and that the more easily a settlement was gained the more jealous would each parish be of the intrusion of a new comer, and the more easily would it find a pretext for removing him.

Settlement by estate was established in the reign of William III., on the ground that it was contrary to the common law and the provisions of Magna Charta to remove a man from his land²; and was extended not only to those who had, but to those who had had, an estate of any kind legal or equitable, and to their executors and administrators.

It was soon after decided that a wife obtained her husband's settlement, and retained it after his death³, and settlement by marriage ranged itself among the increasing list.

Settlement by parentage was added by judicial decisions, "it being hard," as expressed by Lord Holt, "to remove children from their parents."⁴ This doctrine was carried to the extent of conferring permanently on children any settlement which their parents might obtain till "emancipation"—a term the meaning of which is not clearly settled, but may be best defined as the ceasing to form part of the parent's family, an

¹ Indeed doubts on the obligation to relieve strangers are said to have been expressed by learned judges. See *R. v. St. Botolphs, Bishopgate*, Burr. 369.; *R. v. Eastbourn*, 4 East, 103.; *R. v. St. Nicholas, Leicester*, 2 B. & C. 899.; *R. v. Saughton on the Hill*, 2 B. & Ad. 162.

² Per Holt, C. J. in *Ryslip v. Harrow*, 2 Salk. 524. See *R. v. West Sheffield*, Burr. sc. 307.; *Wookey v. Hinton Blewett*, 1 Stra. 576.; *Harrow v. Edgeware*, 2 Bott. 608.

³ *St. Giles v. Eversley*, 2 Bott. 103.

⁴ *Cumnor v. Milton*, 2 Salkeld, 527.; Vin. ab. 382.; 2 Ld. Raym. 1332.; 2 Bott. 38.

event which may not take place till the pauper is far advanced in years, if ever.¹

Settlement by payment of rates, and by serving an office, were added by 3 W. & M. c. 11. s. 6.

Thus, by statutes and judicial decisions, a variety of modes of obtaining settlements was introduced; so numerous, as seldom to leave a parish into which a poor person intruded (as it was called) without some plausible pretext for removing him, and raising so many disputable points, both of fact and of law, as rarely to leave the parish to which he was removed without some hopes of succeeding on appeal. In later times, the legislature seems to have seen the error of this view², and to have been partially awakened to the mischiefs which the law of settlement has entailed upon the country, but attempting no comprehensive measure, has contented itself with throwing difficulties in the way of obtaining settlements by numerous enactments, the chief effect of which has been to increase the entanglements of law with which this subject has been surrounded.³ In the reign of W. III., however³, a plan was hit upon, which much facilitated the migration of labour, viz. of parishes granting certificates to paupers, acknowledging their settlement, which rendered them irremovable from any parish they might go to till actually chargeable. As there was no method, however, of compelling parish officers to give these certificates, it is remarked by Dr. Burn, that if it was the interest of parish officers to require such certificates from persons coming to their parish, by the same rule it was the interest of the officers of the parishes they had left not to give them, and accordingly the remedy fell short of what was contemplated by the legislature. This state of things continued until the 35 Geo. III. c. 101., which prohibited the removal of any person not actually chargeable.

For upwards of a century, the law of settlement may

¹ *R. v. Millington*, 5 B. & A. L. D. 520.; *R. v. Lilleshall*, 14 Law. T. M. C. 97.

² 9 Geo. 4. abolished settlement by purchase of land for less than 30*l*. Difficulties were thrown in the way of obtaining a tenement settlement by 59 Geo. 3. c. 50.; 6 Geo. 4. c. 57.; 1 Will. 4. c. 18.

³ 8 & 9 W. 3. c. 30.

be said to have entirely deprived the poor of their liberty, for every poor man might, in the opinion of justices, be "likely to be chargeable," and few were so fortunate as to be without a colourable settlement; the parish boundaries thus became an unsurmountable barrier to the enterprising and ingenious countryman who would willingly have tried his fortune at some of the trades that flourish in towns, or to the redundant population of a town who would fain have sought for labour in the country. It is difficult to estimate the evils which the country must have suffered from a system which counteracted the natural tendency of the supply of labour to adapt itself to the demand, and consequently limited that demand, and which must have depressed the energies of the labourer by depriving him of every chance of bettering his condition, and consigning him to hopeless imprisonment within his parish. Among the more obvious effects of it is that of impeding the progress of towns, and of mercantile and manufacturing operations, and delaying the development of that extraordinary manufacturing energy which this country has exhibited in recent times.

On the operation of this law, Adam Smith observes: —

"The common people of England, jealous of their liberty, but, like the common people of most other countries, never rightly understanding wherein it consists, have now, for more than a century together, suffered themselves to be exposed to this oppression without a remedy: though men of reflection too have sometimes complained of the law of settlement as a public grievance, yet it has never been the object of any general popular clamour, such as that against general warrants, an abusive practice undoubtedly, but such a one as was not likely to occasion any general oppression. There is scarce a poor man, I will venture to say, who has not felt himself in some part of his life most cruelly oppressed by this ill-contrived law of settlement."

Sweeping alterations have been from time to time proposed in parliament by Mr. Stourges Bourne, Lord Castlereagh, Lord Abinger, and others.

But the New Poor Law Act is the next enactment which claims especial notice. The very able report of the commis-

sioners, on which it was founded contains a clear exposition of many of the evils of the existing Law of Settlement, and proposes alterations in the right direction; but the consideration which they gave this part of their subject does not seem to have been as careful and comprehensive as that which they devoted to the administration of relief and the regulation of workhouses, with a view to revive the operation of the much neglected stat. of Eliz., and the reasons which they assign for the proposed alterations lead logically to far greater ones.

The alteration effected in the Law of Settlement was the abolition of settlement by hiring and service, and by serving an office, and by renting a tenement without paying poor rate for a year, by apprenticeship to the sea service, and by estate without inhabitation within ten miles of it; but the number of removals was very much decreased, and the general administration of the law improved, by the powers which the act contained (beyond those in Gilbert's Act¹), for the formation of unions for the purposes of a common workhouse, and others in which boards of guardians superseded, in a great degree, churchwardens and overseers. The effect has been found to be, that paupers having a settlement in any parish in the union have been commonly relieved without removal, in whatever part of the union they may have happened to reside, the amount being charged to the parish of their settlement; and experience has shown boards of guardians, generally being of a somewhat higher class, and conducting their deliberations in a more public manner, to be more in the habit of acting upon general principles, and less addicted to jobbing and litigation than churchwardens and overseers. But a provision in the statute has had the unexpected effect of increasing the uncertainty of the law and the expense attending removals, whatever effect it may have had (and that seems doubtful) in diminishing the number of appeals. It was provided, that the removing should furnish the recipient parish with the evidence taken before the justices making the order of removal, and that in case of appeal the latter should

¹ 22 of Geo 3. c. 83.

furnish the former with a written statement of the grounds of appeal. The object of this provision was to prevent litigation, it being contemplated that to furnish the parish to which the pauper was sent with the evidence of settlement on which the removing parish relied, would, in many cases, deter them from appealing, where without such information they would have gone to the sessions to try their chance, and that a written statement of the grounds of appeal would have a similar effect on the respondents. But the decisions of the Court of Queen's Bench have given these provisions a tendency which could never have been contemplated by the legislature.

It has been decided, that it is not enough for the removing parish to comply literally with the act, by sending a copy of all the evidence taken before the justices, and thus furnishing all the information in its power. But the written examinations, and the copies of them, have been considered as documents to be looked upon by the Court with a strictness nearly allied to that with which it construes convictions and warrants of commitment; and it has been held that if these examinations do not contain, not merely such evidence as satisfied the justices, and must satisfy any reasonable person, or even the appellants themselves, that in point of fact the settlement exists and can be proved, but direct and technical evidence of every circumstance necessary to constitute a settlement, leaving nothing to implication, however obvious, and moreover show on the face of them every technical formality necessary to give the removing justices jurisdiction, the order of removal must be quashed, and the respondent parish saddled with the pauper, without any inquiry into the settlement in point of fact: on the other hand, informalities in the statement of the grounds of appeal have proved equally serious to the appellants¹; the practical result has been, that the information ordered to be afforded has been converted into a weapon of offence in the hands of the party receiving it — that Courts

¹ See *R. v. Lydeard St. Laurence*, 11 A. & E. 616.; *R. v. Ecclesall Bierlow*, 11 A. & E. 607.; *R. v. Rishworth*, 2 Q. B. 476.; *R. v. Mildenhall*, 2 Q. B. 517.; *High Bickington*, 1 New. Sess. Cas. 121.; *R. v. Bloxam*, ib. 370.; *R. v. Ship-ton-upon-Stour*, ib. 230.; *R. v. Radcliffe Culey*, ib. vol. ii. 352.; *B. v. Molesworth*, ib. 256., and recent settlement cases passim.

of Quarter Sessions are more frequently occupied with the consideration of minute and subtle objections raised by the ingenuity of counsel to the numerous vulnerable parts of the examinations, including captions and jurat, and of the grounds of appeal, than into the settlement of the pauper; that pauperism has been distributed throughout the country much in an inverse ratio to the technical subtlety of the magistrates' clerk in each particular parish, or his means of consulting counsel or a special pleader, at every step to be taken upon ground rendered dangerous by so many unexpected decisions; and that the expense of inquiries before justices has been very much increased.¹

Having thus briefly sketched the history of the law of settlements up to the act passed during the last session, we propose to inquire into the merits of it as it then stood, and for this purpose to subject each of the existing heads of settlement to a short examination.

1. *Birth*.—The question arises, why should a parish in which a pauper is born support him rather than any other? And it must be remembered, that in all cases the burden lies upon the removing parish, spending money raised for the relief of the poor upon the costs of removal, and possibly of attendant litigation, and invading the liberty of the pauper, of showing that the recipient parish ought to maintain him rather than itself.

The doctrine of a 'natural' connection between every man and the spot of ground on which he is born, a sort of *ascriptio glebæ* hinted at by Nolan, is not very intelligible, or likely to find much favour in the present day. The answer most commonly given would probably be to this effect—that a man's birthplace may be presumed to be the principal place of his residence, and probably of the residence of the greater

¹ Mr. Foote, solicitor to the Swindon Union, says, speaking of a case of removal, "I should have had to bring a solicitor from Boston, in Lincolnshire, the attesting witness, and a solicitor from London, who held the lease, and the overseer of Harrow, to produce the rate-books; and I should have had to have a copy of the lease, because we must send every document: the estimate for that was 60*l.* at least. Here is a much more serious case, where I had to get a record of conviction from London, and there was more than 70*l.* expended; and afterwards, we are subject to being turned over on a mere point of form after all that expense. I have a great many of those cases." Question 2543.

part of his friends and connections; that he is likely to be better known there than elsewhere; that the parish in which he is born being more likely than any other to have reaped the benefit of his labour or money in the time of his prosperity ought to support him on a reverse of fortune. But what if he happened to be born while his parents were merely passing through the parish, possibly then in a state of vagrancy, whereas the family have since settled and thriven, the pauper among them, in a distant place? What if by migrating, in the hope of still further bettering himself, into the removing parish, he has, by sickness and unforeseen circumstances, become chargeable, and would, in all probability, thrive again, if either allowed to remain or sent to the place where he has thriven before? What if he be a total stranger to the place of his birth, never enriched it by a day's labour, never held communication with a single person in it; is he nevertheless to be banished to a spot where nothing but perpetual pauperism awaits him, and which can on no principle of justice be taxed for his support? A hundred cases might be put of more or less hardship; but it abundantly appears that birth settlement affords no security against removals, not only unattended with advantage, but highly injurious, as well to the pauper as to the public.

The reasons, moreover, which probably suggested birth settlement in this and other countries, viz. the doctrine of the serfdom, or attachment to the soil of the labouring population, and the fact of a labouring man's birthplace and place of residence being generally convertible, have lost their force now labour has become at least nominally free, and the greater demand for it, facilities of travelling, and other causes, have induced more migratory habits among labourers.

2. *Parentage.* — Under this head the children obtain any new settlement which the father may acquire at any time in any part of the country until "emancipation."

It would seem¹, that if the father desert his home, but the mother still remain with her family, each of the family still gains any settlement which the father may acquire in any distant parish, and retains it whether the father become a

¹ R. v. Wilmington, 5 B. & A. L. D. 520.

burthen to that parish or not, and whether or not he continue to reside in it.

Thus a parish may be burthened with a totally strange family of paupers because the father happened at some time or other to have obtained a settlement in it. But if the father have no discoverable settlement of his own, he takes that of his parents: if no settlement of the father, either of his own acquisition or derivative be hit upon, the mother's maiden settlement and that of her ancestors is hunted up, and some parish is fixed upon where a grandfather by one side or the other is supposed to have been born or apprenticed. The practical result of this head of settlement is to cause the removal, in most cases, of paupers from places where they are known, and which probably have derived some benefit from their labour, possibly in which they have resided all their lives and formed their only friends, to some remote region where an old parish register happens to contain the family name.

Another evil of this head of settlement is, that it re-opens the abolished sources of litigation. It is comparatively useless to abolish a tedious inquiry into the hiring of the pauper, exceptive, conditional, or retrospective, by the week, by the month, or by the year; the dissolution or dispensation of such hiring, by illness, imprisonment, absence with leave or without leave, parting by consent, dismissal, substitution of another contract, or fraud, the service and nature of it under one or more hirings, consecutive or at intervals, and residence under or not under the hiring or hirings; if a similar inquiry is to be opened up, still more obscured by the lapse of time, into all these incidents in the life of a father or grandfather.

3. *Marriage.*—Under the present law, a woman acquires any settlement which her husband may possess or acquire, either before or after her marriage, and during cohabitation. That while living with her husband she should acquire any settlement he may obtain during that time seems just; but in the event of his acquiring none during marriage, it would seem fairer that the widow should be sent, if removable, to the locality of her relations rather than of his. It is clear

that no good reason can be shown for dragging a widow from the place of her residence and connections, in which she may have maintained herself in independence during many years of her widowhood, to some remote place in which an ancestor of her husband may have chanced to have acquired a settlement, possibly by some of the abolished modes.

4. *Apprenticeship*.—This mode of settlement makes necessary three inquiries—into the binding, the service, and the residence, respectively.

“The binding” gives rise to innumerable questions relative to the proof of the indenture; the validity of it, the signature of the proper parties, in the case of parish apprenticeships of the majority of the parish officers of the time being, the assent of justices, and, since 56 Geo. 3. c. 139., the previous order and subsequent allowance of the justices, the stamp, evidence of loss, of search, of proper custody, admission and nature of secondary evidence.

Service in the character of an apprentice under the indenture must be shown, and residence in the parish for forty days; and if there be residence in more than one parish for forty days, in which parish the apprentice last slept.

It naturally occurs to ask, how much of this complicated inquiry is relevant to the only question which ought to be in issue, whether the parish to which the pauper is removed be that which in justice ought to maintain him rather than any other, and in which he is most likely to thrive? How, for example, is this question affected by an indenture being found, or not found, in the parish chest, being signed or unsigned, stamped or unstamped? By the residence being as an apprentice, or a footman, or an independent labourer? It is difficult to see the object of any part of the inquiry, except that which relates to residence, by far the simplest; and even this is unsatisfactory, owing to the shortness of the term required.

It notoriously often happens that an old man is sent from the place where he has resided independently the greater part of his life, to some remote parish he vaguely remembers to have seen, by virtue of an indenture raked up from the bottom of a parish chest, which fraudulent overseers may, in

his early childhood, have bribed a master to execute. It should be mentioned, that stat. 7 & 8 Vic. c. 101. s. 12. has had the accidental effect of making it doubtful whether a settlement by apprenticeship can longer be obtained.

5. *Tenement and Rate-paying Settlement.* — These heads of settlement are classed together, as nearly of the same nature, both relating to tenements of 10*l.* a year rental; the difference being that somewhat fewer difficulties are in the way of obtaining settlement by the payment of rates than by rent and occupation. This settlement seems more in conformity with true principles, having apparently the object of saddling that parish with the pauper which derived benefit from him in his better days, and in which he is likely to be known. But it may be asked, Why should it be necessary to give 10*l.* a year for a house? Why to hire it for a year? Why to occupy it under a yearly hiring, and no other? Why to be *charged with*¹ as well as to pay the rates, in order to acquire a settlement? Why should not (for example) the occupation of a house, or part of one, at the rent of 9*l.* or 5*l.*, or under a succession of half-yearly or monthly hirings, be enough? In a recent case² a witness said, “On the 22d of July, 1839, I let a house, situate at No. 10. in Leicester-street, in the parish of St. Sepulchre, in the town of Northampton, to Thomas Adams, the husband of the pauper, at the rent of 10*l.* per annum, exclusive of the parochial rate. The said Thomas Adams occupied the house till the 22d of July, 1841, and paid me the whole of the rent during that time.” Mr. Symons, in his *Treatise on Settlements*, remarks, “This seems at first sight explicit enough; but the Court held that it did not expressly state that the occupation was under the yearly hiring, and that nothing was to be left to intendment; and that the examination ought to contain a conclusion against all those circumstances which would prevent a settlement within the statute. Coleridge J., however, dissented from the judgment, and it must be deemed to have carried the law to the extremity of strictness.”

¹ R. v. St. Olaves, 13 L. J. M. C. 161.

² R. v. St. Sepulchre, Northampton, 14 L. J. M. C. 8.

This mode of settlement seems of too nice and technical a nature; and it suggests itself to inquire whether one more simple and comprehensive, and less pregnant with points of law, may not be found.

6. *Estate Settlement.*—Any estate of inheritance, however small, or any bought estate for which 30*l.* purchase-money has been paid, procures a settlement for the pauper as long as he resides within ten miles of it. To this head of settlement it may be objected, that it gives rise to innumerable nice points respecting the nature of the estate, the title of the pauper, and the character in which he holds it, whether as trustee or cestuique trust, mortgagor or mortgagee, executor, administrator, &c., wholly unconnected with the true question at issue.

It remains to be observed, that Scotch and Irish paupers were formerly removable at the expense of the county to any part of Ireland or Scotland; but a recent act provides for their removal to certain convenient ports, and requires all parishes with populations above 30,000 to pay the costs themselves, giving the power of appeal, in certain cases, to the Quarter Sessions through the Poor Law Commissioners. And an act has been passed during the present session, facilitating the process of removal.

From the examination to which the law has been subjected, curtailed, indeed, by space to the more obvious effects of each of the separate heads of settlement, it appears that, under each of those heads a pauper might have been removed to a parish on all principles of justice less bound to maintain him, and in which he was less likely to thrive than that from which he was sent; that most of them had a direct tendency to produce this result; that the complicity of the law, aided by judicial decisions, led to great and utterly useless expense, both in the preliminary inquiry before the removing justices, and in appeals at Quarter Sessions, and to so much uncertainty, as practically to substitute chance for the still more unfair provisions of the law. But the most serious evils with which it is chargeable, are the impediments which

it has thrown in the way of the free circulation, and consequent efficacy of labour, a subject which requires further investigation.

Parochial imprisonment of the unoffending poor, which existed for a century in this country in a stricter form than it now prevails in Russia, has long since disappeared; and unquestionably, if any demand for labour, however great or sudden, arise in a manufacturing town, or for the purposes of a railway or public work, there is no lack of labourers, and often more than enough to supply it. Facts of this sort, which a cursory view of the subject presents, are in favour of the conclusion that labour is free. A more close and practical examination, however, discloses operations of the law, not all obvious *à priori*, but, when pointed out, easily accounted for. It has been discovered that a strong feeling prevails in parishes, more especially agricultural ones, against labourers coming into them who have not a settlement, which manifests itself chiefly in a general reluctance amongst landowners to employ them, amounting in many instances to a combination for that purpose, carried so far, that in some counties covenants in leases are not unusual to introduce no new labourers into the parish.¹ It is considered that the settled labourers have a sort of right to be employed; that if not employed they must fall upon the parish; and that therefore it is better to obtain some work from them in return for their maintenance. The strength, skill, or industry of new comers is commonly little inquired into; and if some proprietor more hold than the rest so far break through the established system as to introduce better labourers from a distance, general discontent and dissatisfaction is produced. From the same fear of burdens falling on the parish, married labourers with a family are preferred to single ones, and thus a premium is conferred on improvident marriages, and the old allowance system kept up in another form. In short, on the hiring of a labourer, the question generally is not as to his capabilities, but his parish and the number of his children. The evidence contained in the Reports on this

¹ Evidence of Mr. Chadwick. It is apprehended that such covenants would now be deemed void, as opposed to public policy.

subject shows that a certain set of labourers are employed at wages just sufficient to keep them off the poor rates: no inducement is given to the more industrious of them to work better and obtain higher wages, because a certain number must be maintained, and the farmer would rather have the same amount of work done, (for example,) by three men at 8*s.* a week, than by two at 12*s.*, because in the latter case he considers that the third must fall upon the parish. The labourers considering themselves certain of work and maintenance either from their master or the parish, secure from competition, and hopeless of bettering their condition, except perhaps by going in search of some new employment in a distant town, resign themselves to their condition, accept their pittance, and do as little in return for it as they can. The result has been that good labourers have been little distinguished from bad, and that the whole labouring population of many counties, more particularly the southern and western ones, where the old poor law was the worst administered, and the demand for labour for manufacturing purposes has decreased, has become comparatively ineffective. It may be added, that the same causes have tended much to check the employment of machinery in agriculture.²

On the other hand, were the farmer unshackled by apprehensions on the subject of settlement, he would select the best labourers from adjoining parishes, or wherever he could get them: the best labourers would be in requisition, and obtain the highest wages; there would be an inducement to labourers generally to make themselves good labourers, and the effectiveness of labour would be increased. But it may be said, if six labourers with or without machinery did the work of ten, would not the other four be thrown out of employment and become burdens? It may be answered, that it is better they should be so directly, than indirectly by a sort of employment which tends to depress the general productiveness of labour; that if the same amount of work were done by the six or by machinery for their employers as before, the amount of parish work done by the four would be so much gained; that probably they would not be unemployed

¹ Fifth Report of the Committee, H. C. 1847, p. 53, *et passim*.

² Evidence of E. Chadwick, Esq., question 1980.

long; for it is well established that the good labourer at high wages is cheaper than the bad at low; that more effective labour would make farming more profitable, and by increasing farming operations, create a further demand for labour of various descriptions, some of which would probably absorb the four inferior workmen.

Among the tests of the ineffectiveness of ordinary labour, is the employing labourers by the piece, by which it is discovered that in most cases a third more work is done in the same time: the practice of thus employing them, however, is checked by the considerations above alluded to, viz. that a certain number of labourers must be maintained.

Evidence has also been given of the highway rates being not unfrequently misapplied by churchwardens and overseers to the maintenance of settled paupers, partly from mistaken charity, partly for the purpose of keeping down the apparent expenses of the parish, by which its contribution to the union fund is regulated. Among the evils charged to the present law, we should not omit to mention, that it has given rise to much jobbing and unfair dealing among parish officers and landowners in endeavouring to shift the burden of pauperism from one parish to another, which the Legislature has in vain endeavoured to prevent. One of the most common modes of effecting this is a custom in what is called close parishes, that is, parishes held by one or a few proprietors only, to prevent labourers who work in those parishes residing in them, by pulling down cottages, or preventing their being built, residence being necessary to each form of settlement: thus it often happens that a number of labourers whose work is in a country parish, are crowded together in a town or village at some miles distance, from and to which they have to walk daily, exhausting a portion of their strength, which would otherwise be usefully employed and obtain for them higher wages, in unproductive and unremunerated labour.¹

During the last session of Parliament a considerable alteration of the law was effected by the 9 & 10 Vic. c. 66., which, as interpreted by the Attorney and Solicitor General, may be briefly expressed thus:—

¹ Evidence of Mr. Chadwick.

1. As making paupers who had resided for five years next before obtaining the order of removal irremovable, without however giving them a settlement.

2. Making a widow irremovable within twelve months of her husband's death.

3. Making irremovable persons becoming chargeable from sickness or accident, unless likely to lead to permanent disability.

The principle upon which the first clause of this enactment must have been framed seems to be this; that it is but fair that a parish which has reaped the benefit of a man's residence for five years (for every person residing in a parish if not a burden must be a benefit to it — the idle man, by spending his income, the industrious, by contributing his labour also) should support him in his adversity; and that a place in which a man has thriven for five years is probably one in which he has formed connexions who may help to maintain or to set him up again in the world. But it naturally occurs to ask, if these be good grounds for irremovability, why not also for settlement? if they be not good for settlement, on what others is it possible to justify the sending of a pauper from one parish to another?

One effect of the measure has been to raise a great clamour from most of the town parishes, who complain that their rating has been increased from various causes:

1. From loss of the power to remove paupers who had been resident five years, and would otherwise have become chargeable.

2. From a great number of paupers resident more than five years having thrown themselves upon the poor-rate in consequence of the act, but who would otherwise have been deterred by the fear of removal.

3. From many labourers resident in the town, but working in country parishes in which they have settlements, being thrown out of work by those parishes because they have no longer any motive to maintain them in employment, and can shift the burden of their pauperism on the town.

4. From having to maintain resident paupers having settlements in other places, and formerly maintained by those places.

5. From a general disposition of the poor, which the act has created, or rather fostered, to crowd into towns.

The evidence further shows attempts on the part of towns to evade the burden by (among other things) inducing paupers to break their residence, even after the five years are accomplished — for the five years must be “next before the applying for the warrant of removal” — and a disposition to refuse relief to the non-settled poor, in the hope of driving them to their parishes.

Among its omissions (to say nothing of mere inaccuracies) is the broad and obvious one of leaving all the complicated heads of settlement undisturbed, and a very large proportion of the poor exposed to the evils of them. On the whole, the Act seems to have failed, principally from not going far enough, and, like most timid and hesitating attempts to follow out a principle, has proved a step rather into difficulties than through them.

The number of petitions presented, and the general feeling entertained of the necessity of a great and speedy alteration of this part of the law, occasioned the appointment of the Select Committee, whose report is referred to at the head of this Article. After sitting for four months, and receiving replies to some eight thousand questions, they have announced their inability to agree as to the best mode of altering the law, and have published only the evidence taken before them: that they are unanimous, however, as to the necessity of some sweeping alterations, is very generally known; and it is whispered that among those alterations is an increase of the size of the districts for the relief of the poor, and an extensive modification, if not the abolition, of the law of settlement. Regretting, as we do, the absence of any authentic report of their views, we cannot but think their labours amply rewarded by the valuable mass of evidence which they have collected and laid before the public.

We proceed to explain the views on this subject which that evidence and previous consideration have induced us to form.

The question which arises on the threshold of this inquiry

is, whether the knot may be safely cut by the simple process of the abolition of settlement and removal, without any other legislative provisions?

The tendency of paupers to congregate in certain districts, probably such as had the reputation of being more charitably disposed than others, and in towns generally, was felt as a continuing grievance for a long period of our history, if we may judge by the many attempts, seemingly unsuccessful, made by the Legislature during many reigns to repress it. The tendency to congregate in towns, which became much stronger after the dissolution of the monasteries, may, in a great measure, be accounted for by the considerations, that the towns held most of the charitable institutions, which the laity of this country have established, in greater numbers than that of any other, and, at the same time, offered a better field for promiscuous begging, and better cover for thieving and all kinds of malpractices; that the hope of higher wages, which many kinds of labour, required only in towns, have always obtained, and of rising in the world by the various openings presented by trades, must have attracted numbers of agricultural labourers, who saw no prospect of any thing beyond bare subsistence in the country, some fit, some unfit, for their new mode of life: we may, perhaps, rank among the inducements a gregarious disposition, to some extent common to all mankind, and found in a greater degree among the poor; and the prospect of more warmth and better shelter in the winter, which outweigh with the poor any amount of inconvenience from crowding together, uncleanness or bad ventilation.

The preamble of the stat. 13 & 14 Car. II., before referred to (p. 333.), though not very clearly expressed, sufficiently indicates a serious evil, probably the subject of general complaint, which it must be acknowledged that the Legislature at length succeeded in repressing by an iron hand; at the expense, however, of entailing incomparably greater evils upon the country. The removal of the more stringent and tyrannical part of that enactment by 35 Geo. III. c. 101., restored in a great measure the free circulation of labour, which tended, by a natural and healthy action, towards the rising towns, but at the same time redeveloped the old

tendencies of pauperism to flock in disproportionate numbers to certain favourite localities. The very rapid fluctuations, moreover, which seem scarcely separable from manufacturing enterprise, have produced in recent times violent inequalities in the distribution of pauperism: a sudden increase of demand for some particular production has called into existence mills and factories; the news, exaggerated by rumour, has been borne through the country, and labourers have flocked in from all parts, perhaps in greater numbers than were wanted. For a short time all has been activity, when the demand has failed as suddenly as it arose; manufacturers have become bankrupt, mills have been closed, and the labour attracted by them turned to pauperism, the burden of which has fallen with peculiar hardship on a district just prostrated by a sudden reverse of fortune. It may be said that it is but just for a manufacturing town to maintain in their adversity labourers by whose industry it has been enriched; and this, as a general proposition, may be true: but the question being now, whether it would be safe or just to compel every place to maintain all the poor who may happen to be in it at all times, without any power of removal or aid in their maintenance, if cases of probable occurrence can be put, attended with unbearable hardship to certain districts, the negative of the proposition will be established. It will, therefore, be sufficient to reply, that cases may arise in which the greater part of the burden may consist of persons who have been but a short time in the place, and the value of whose work can afford no proportionate set-off against the cost of maintaining them with their families for the rest of their lives; and in which the suddenness and extent of the pressure of the poor rates may be such as to force rate-payers out of the place, and so impoverish those who remain as permanently to cripple its resources, and prevent its recovering itself. The state of Nottingham, in 1837, may be instanced, in which 10,000 persons were thrown out of employment in one fortnight, almost all of whom fell upon the poor rates.¹ Similar vicissitudes have been experienced

¹ Evidence of E. Gulson, Esq., question 1300.

by Manchester, Leeds, and other manufacturing towns. The report, moreover, of the Poor Law Commissioners shows a still increasing tendency of pauperism to the towns beyond the means which they afford of maintaining it; and if no other consideration were sufficient, the inundations of Irish at the present time, which may be expected periodically if not permanently, i. e. as long as Ireland is poorer than England, to visit certain towns on the western coast, seem conclusively to prove that this power cannot be safely taken away, at least without some other provision being made for equalizing the burden of pauperism. Many such provisions have been proposed, the adoption of which, it is said, would obviate the necessity of paupers being removed. — Among these are: —

1. A national rate or fund, by which all the poor are to be maintained wherever they may happen to be.

The objections to this scheme are, that the minute difference which any exertions or economy of the overseers or guardian of any particular parish or union would make in the amount of the contribution of that parish or union to the fund, would not be enough to stimulate them to due economy, diligence, and care, in the distribution of the money intrusted to them, and to the diminution and prevention as well as relief of pauperism, — in short, that the charitable feelings of individuals cannot safely be trusted with the public money.

This argument is undoubtedly based on the assumption, that local administration to some extent is desirable, and does not meet the plan proposed by some of placing the whole administration of the law in the hands of paid government officials. But the feeling already displayed against the amount of “centralization” which has been established, sufficiently shows that such a system, opposed as it would be to every popular notion and feeling in which Englishmen have been educated, would be a dangerous experiment, with scarcely a chance of success, even were there no other insuperable objections to it. It may be added, that probably many of the poor who would feel some compunction and shame at becoming burdens on their friends and neigh-

bours, would have no scruples in the way of being pensioners on the State; that a share in the State fund would be looked upon more as a matter of right, and less of charity, than relief is now, and that pauperism would accordingly lose much of its present sense of dependence, (one stimulus, at least, to escape from it,) and attain comparative respectability. On this subject an extract is given from a Report of Commissioners appointed to examine into the state of pauperism in Massachusetts, U. S., one of the States which has adopted the principle of a national fund. After stating that a national provision has existed in this State since the year 1675, and recommending its abolition, the report proceeds to describe the state of the paupers depending on it:—

“There is not a more abject class of our fellow-beings to be found in this country than in this class of the poor. Almshouses, where they are to be found, are their inns, at which they stop for refreshment. Here they find rest when too much fatigued to travel, and medical aid when they are sick; and as they choose not to labour, they leave these stopping-places when they have regained strength to enable them to travel, and pass from town to town, *demanding* their portion of the State’s allowance for them as *their right*; and from place to place they receive a portion of this allowance, as the easiest mode of getting rid of them; and they talk of the “allowance” as their “rations;” and when lodged for a time by the necessity of the case with the town’s poor, it is their boast that they, by the State’s allowance for them, support the town’s inmates of the House.”¹

An endeavour has been made to meet this difficulty by suggesting that aid be given by the State only to some extent, leaving the rest to the parish or union.

To this plan all the above objections apply to some extent.—If the burdened district is to be but little assisted, it suffers much injustice, and there seems no adequate reason for establishing the machinery incident to a national rate. On the other hand, if it be assisted to any great extent, there seem no adequate motives of economy; and paupers will be—

¹ Quoted in Preface to Foreign Communications attached to Report of Poor Law Commissioners, 1834, p. 9.

come substantially State pensioners. To the proposition of a county rate the same objections apply, with somewhat less force; while, on the other hand, the arguments in favour of it are proportionately weaker.

2. It has been proposed that some form of settlement be retained, without the power of removal, and that the parish supporting a pauper who has been adjudged settled in another parish should be entitled to charge the costs of his maintenance to that parish.

This plan seems still more objectionable than the last; for if little economy could be expected of parish officers spending the money of the State, still less may be expected of them spending the money of other parishes, often regarded by them as hostile ones: that many abuses would be made possible, such as that of relief being given partly in lieu of wages, and thus the labour of paupers obtained at a lower rate; that a new source of perpetual dispute and litigation would be opened up by the demands of different parishes upon one another, for the maintenance of paupers, in addition to those arising from their settlement.

3. It has been proposed to meet the evil by establishing a system of union chargeability and rating throughout the country; and the arguments by which this plan is supported are deserving of great attention. It is said that, in most instances, the influx of labourers into a town springs from the parishes immediately around it, and is mainly caused by those parishes pulling down cottages or preventing the building of a sufficient number of them for the accommodation of the labourers; that the proposed plan will make it a matter of entire indifference to rate-payers in what parish of a union a pauper resides; that the proprietors of close parishes will generally find it impracticable to prevent their labourers finding residences in some adjoining parish within the union, and, were it practicable, would have a less motive for doing so, by the ratio of the parish to the union; a motive scarcely sufficient to outweigh the advantages of cottage-rent, and having the labourers on the place of their employment, — to say nothing of the odium justly incurred by such practices. That the general establishment of unions and boards

of guardians throughout the country will put an end to those practices too often resorted to by the officers of small parishes, by which paupers are bandied about from parish to parish, and settlements established by bribery or trick. That the farmer will have no motive to employ labourers of one parish beyond those of another within the union, and comparatively a small motive to prefer labourers of his union to labourers from other unions, insufficient it is anticipated practically to influence his choice, which will be determined, like that of the town manufacturer or tradesman, by the goodness of the workman: that free competition, now scarcely known, will be introduced among agricultural labourers, and materially increase the spirit, energy, and productiveness of that class, and consequently the capital which employs it. It is said, that sufficient interest in the distribution of the rates will remain for purposes of economy; that the evil, if it be such, of diminution of interest, will be more than compensated by the superiority of boards of guardians, over churchwardens and overseers, and a more general uniformity of system; that unions will obtain the necessary supplies of goods at a lower price, by dealing with larger contractors; and that no sudden influx or augmentation of pauperism is likely to press with unbearable severity on a union. These reasons seem conclusive in favour of union rating and union chargeability; but not so of the total abolition of the power of removal. Before determining this question, it is necessary to settle what ought to be the size of a union. The unions at present formed are of all sizes, from two to upwards of forty parishes; some as much as sixteen miles in diameter. The evidence seems to establish that between six and eight miles in diameter is the most desirable size. In larger ones great hardships arise to paupers from the distance they have to travel to obtain relief; while to constitute many relief boards is to run the risk of breaking through the uniformity of system which ought to prevail throughout one union at least, if not throughout the country at large: moreover, there is a danger of the motive to economize being too much diluted, and the board of guardians becoming too large for the convenient despatch of business. On the other hand, the evils of small districts have been

sufficiently dwelt on. If such be the ordinary size of which unions should be constituted, about which the general opinion seems to be nearly agreed, can it be said, that such a disaster as that experienced by Nottingham, before alluded to, would not cause an intolerable pressure on the funds even of a union consisting of Nottingham and the surrounding agricultural parishes? Should no relief whatever be afforded to unions, (and there must be some,) consisting almost entirely of town, throughout the whole of which the same cause might suddenly convert labour into pauperism? Would it be safe at once to abolish the only existing mode by which the Irish flood now pouring on our principal towns may be turned back upon that country?

It has been said, that the number of removals, in periods of distress, do not appear sufficient to have afforded adequate relief; but a little consideration shows that the efficacy of the law is not fairly measured by this test. When it can be shown clearly to a parish that a pauper resident elsewhere is settled in it, that parish commonly prefers maintaining him where he is to maintaining him at home, and paying in addition the costs of his removal, especially if there seem a chance of his again obtaining work at the place of his residence. Again, many paupers prefer removing themselves to being compulsorily removed, possibly to some place not agreeable to them; others, for the same cause, keep off the rates, and use greater efforts than they would otherwise do to obtain employment: all these things being considered, it appears probable that the power of removal relieves an overburdened district to a far greater degree than can be measured by the exercise of it. The power has, however, on many occasions, been exercised to a great extent. We find, for example, that in 1842, 939 persons were removed from Stockport; the number in the preceding and following years being 372 and 308 respectively.¹ And Mr. Gulson, an assistant Poor Law Commissioner, gives it as his opinion, that but for the power of removal at the time of the Nottingham catastrophe, "half the rate-payers would have run out of it."² Most of the

¹ Evidence of H. Coppock, Esq., question 5253.

² Evidence of E. Gulson, Esq., question 1352.

large towns on the western coast have been much relieved, for many years, by the removal of Irish; and still remove to a great extent¹, notwithstanding certain difficulties in the shape of summoning the pauper and others, created by a late statute², which, however, have been obviated by an act passed during the present session.

Liverpool alone seems to have taken no steps to remove the evil; but the reasons for this non-exertion as stated by the vestry clerk and legal adviser of the town authorities, are far from satisfactory; amounting only to this: that functionary has refused to remove owing to the difficulties thrown in the way of that course by the late act, or rather his interpretation of it, contrary to the wishes of the Poor Law Commissioners who declare that interpretation to be wrong, and to the practice of other large towns. Report, however, gives a different version to the matter, whispering that Liverpool finds it cheaper to transmit the Irish by railway into the interior of this country than to send them back to their own.³

As additional reasons for retaining the power of removal in some cases, it may be urged, that perfect uniformity of administration cannot be expected even in unions; and that there still will be a disposition, especially among the old and infirm (to say nothing of vagrants), to flock inordinately to those reputed the most bountiful in the administration of relief, or containing the greatest number of charitable institutions or families; that it would be unjust to deny to such districts the power of relieving themselves, in some degree; and that, to do so, would be apt to induce an undesirable competition among unions in parsimony and severity to the poor; that the fear of removal often operates as a salutary check on paupers applying for relief, and supplies them with a stimulus which bears them through temporary difficulties; and that removal alone is able to dispel the congestion of pauperism, so to speak, to which many places are periodically, others continually subjected, and which must be ne-

¹ Bristol is removing great numbers of paupers at 8s. a head. Manchester at 14. 14s. per family. Evidence of R. Hall, Esq. Leeds and other towns are doing the same.

² 8 & 9 Vict. c. 117.

³ See Evidence of Mr. Lowndes.

cessarily detrimental, among other things, to the sanitary condition of the public.

This tendency of pauperism to congestion in certain districts has been felt more or less by all the civilised countries at present existing, and few if any are without provisions for restraining it, either by punishment, removal, or confinement to a certain district, aided by prevention of marriages, and other checks on the increase of pauperism, although no country, with the exception of some of the United States, has adopted a complicated system of settlement such as ours, or indeed, any other ground of settlement than birth and residence. In Belgium, and some parts of France, four years' residence confers a settlement; in other parts of France, one year. In Sweden, all wandering poor who cannot obtain employment in a certain time are placed in the House of Correction: in Russia, every poor man, if found out of his parish, is placed in the hands of the police, and conveyed to it. In Prussia, every person coming into a town is questioned as to his means of living, and if his answers be not satisfactory, sent back to the last place of his abode, every place being considered bound to maintain any person who has once become a sojourner in it, though no compulsory rates be levied. Servants acquire a settlement by three years' residence, but lose it after a year's absence; and minors have the settlement of their fathers.

In Wurtemberg, if a man be not settled as a burgher or beisitzer (settled non-freeman), he may be assigned by the police to any place they see fit.

In Bavaria, the pauper is not allowed to leave his dwelling without the leave of the head of the village, to stay for a time or permanently in another village, even if it be in the same district; there are also police districts which the pauper cannot leave without the permission of the police, who will not give it if they think he is likely to become burdensome to some other district.

In Denmark, whose poor law most resembles ours of any country, but which is without the provision for removal, the pressure of pauperism has been very severely felt; while the Canton de Berne, which allows no removals, and is more

lavish to its poor than any other country, is the most of all oppressed with pauperism.¹

On the whole, the coast does not seem clear at present for the total abolition of settlement and removal; nor is public opinion prepared for so great a change.

We have seen that a residential and birth settlement were the only forms which suggested themselves for centuries to the simplicity of our ancestors, or have been thought of in any country but our own, and have traced the origin in mistaken principles, and the ill-working of our present complicated system: the grounds on which birth settlement may once have been supported, we have shown no longer to exist, and it is apprehended that the consideration which has been already devoted to this part of the subject sufficiently shows a residential to be the only settlement now defensible on true principles. The only objection to this form of settlement entitled to much weight, is that which has been already urged, viz., the tendency of certain parishes to force their labourers into residing in other parishes. Admitting the force of this objection so far as to call, among other reasons, for a revision of the districts of settlements, it may be remarked, 1st, that each of the present heads of settlement is open to the same objection — all requiring residence, except birth settlement — and as to this, that children cannot well be born in a parish in which there are no houses. 2d, That the number of close parishes bears but a very small proportion to the others, though what has not, as far as we know, been ascertained, and that this system, generally based in mistaken policy, has not been adopted in all, or probably the greater part of them; that it is a mistake to suppose that the close parish has the whole value of the labourer's work; it has only the excess of the value of his work over the wages paid for it, which wages are probably spent in the parish of his residence, and that that parish must therefore reap some advantage from him, if not all it might. 3d, It may be asked what mode of settlement should be substituted? all the present modes have been examined and found wanting. Suppose it were enacted that every man who had pursued his calling or employment in a

¹ See Foreign Communications annexed to Report of the Poor Law Commissioners, 1834.

certain district for a certain time should obtain a settlement there? This would not apply to persons with small independencies, possibly disabled from work, whom there would be as good grounds for removing as others, and would therefore be admissible, not as a substitute for a residential settlement, but as an additional head, bringing in its train all the difficulties of two settlements instead of one. Again, great difficulties would arise in applying this test to a large number of persons permanently resident in one place, and working by the job for a variety of masters, at no long time with each; the working and residential settlement in such cases would obviously clash, and lead to complicated inquiries. Unquestionably a residential settlement of some considerable period would lead to many difficult inquiries in point of fact; questions would arise as to the effect of absences longer or shorter, and a variety of conceivable circumstances, proving or disproving the "*animus redeundi*," and otherwise affecting the question of domicile. Most, if not all, however, of these questions would be questions of fact, perhaps difficult to determine, but determinable by the magistrates as a jury, and seldom if ever giving rise to questions of law for the Courts above. Again, it should be remembered that under the present law this very question enters into the determination of every settlement case, in addition to a great many others; such, for example, as title to estate, nature of the holding of a tenement, validity of binding, &c., all of which, and a vast number of cases, have come before the Court of Queen's Bench, giving rise to many, apparently contradictory, certainly very finely distinguished decisions. Whereas, it is believed that no case has been sent up from sessions involving merely a question of residence; indeed, the Courts have lately discouraged cases being sent to them involving questions of fact and the sufficiency of evidence, and would very probably intimate that residence was one of these.

But the adoption of a residential settlement, though it would be the best even under the existing state of things, would be comparatively unsatisfactory, without, at the same time, enlarging and making uniform the districts for chargeability, relief, and settlement, the principal arguments for

which have been before stated. It is therefore proposed as an additional measure, that compulsory powers be given to the commissioners for the purpose of forming the whole country into unions. The principle on which unions should be formed is that which has been generally, though not always, adopted, of taking a circle of parishes, with a town for its centre; and it has been before observed, that some six or eight miles seems the proper diameter for a union.

But objections have been urged to this system, on the ground of the difficulty of establishing a satisfactory method of union rating, and on this subject a variety of propositions have been made.

Without entering into a detailed examination of these propositions, it may be sufficient to say, that to impose a uniform rate at once upon all the parishes formed into a union, one of which may now pay five shillings in the pound, while another pays one, would be obviously unjust, and an intolerable hardship on persons who had recently purchased land, or taken it upon lease in the latter parish. On the other hand, that to fix for ever the proportion of contribution from each parish according to any present test which may be selected, would be a species of finality ill adapted to the changeable state of parochial as of all other affairs; that to preserve the present proportion in the pound of rate levied in each parish on the property of that parish, whatever it might happen to be at periodical valuations, would not altogether meet the evil; but that an approximation to a uniform rate should be attempted by periodical averages, or other means, into which a further inquiry seems to be needed. It may be sufficient here to say, that these difficulties of detail appear by no means of such a character as to outweigh the many advantages of the union system.

With reference to the mode of taxation for the relief of the poor, a subject not arising immediately out of this inquiry, or capable of being treated of satisfactorily within the limits of this article, we will merely remark, that as long as the taxation of the country remains indirect, insuperable difficulties seem to oppose themselves to any material alteration of the system.

If then it has been shown that the country should be

divided into unions, and also that some form of settlement should be retained, it sufficiently follows, from the arguments above adduced, that the area of that settlement should be a union: indeed no less or more would be reconcilable with the advantages on which union settlement has been grounded.

It remains to inquire into the length of the residence which should confer a settlement; and whether any other conditions than mere chargeability and settlement elsewhere should be attached to the power of removal.

Keeping in mind the principle that removal is in itself an evil, and should not take place without good cause shown against the recipient parish, some considerable term seems desirable, and it is proposed that the settlement of every pauper should be in that parish which has last been the principal place of his residence for five consecutive years.

A less term may be thought desirable by some, on the ground that fewer persons would be removable. But if to prevent removals were the sole object of legislation, that would be best attained by the direct method of abolishing them. Assuming it to have been shown that the power should be retained, the object of legislation is not so much to prevent removals as to see that they are not vexatious, and answer some public end.

To take one year for the term instead of five would make more persons irremovable; but, on the other hand, it would make those who were removable, removable with less cause, possibly to places where they were little known, and on which they had very slender claims, and would possibly increase instead of lessen the number of removals. It may be added, that the term of three years, which confers a settlement in Scotland, is generally considered in that country as too short.¹

But it may be said, according to the principles above laid down, the pauper should be removed to the place where he has resided longest; that, for example, it would be unfair to send him to the place where he has resided five years, if he have formerly resided at another for twenty years.

The only reply to this is, that to necessitate an inquiry

¹ Evidence of E. Gulson, Esq.

into the whole history of the pauper's life would open a wide door to that litigation, to avoid which is one of the objects of an alteration in the law ; and that it seems so far desirable to allow this object to modify the others, as to establish a settlement requiring sufficient length of residence to put an end to frivolous removals, at the same time avoiding a long and complicated inquiry.

With respect to Scotch and Irish paupers, it is proposed, that if they have obtained no settlement in England, they be removable to their respective countries.

The last act, 9 & 10 Vict. c. 66., has made a provision to meet the hardship of removing persons requiring relief owing to sickness or accident, who might very probably be able to support themselves again on their recovery ; but this provision fails to meet cases of nearly equal hardship ; such, for example, as a man being suddenly thrown out of work, and obliged to come upon the parish while seeking another employment. It seems but fair that a man in such a position should have time to recover himself before removed from the place which he has selected for his residence, probably from a better knowledge than any body else can have of his own interest. It seems unfair to remove him until, at least, there is some probability of his falling among the class of perpetual paupers. With this view, it is proposed that a provision be made prohibiting the removal of a pauper who has not been chargeable to the union for some considerable time, say one month within twelve months of his removal. To place the one month immediately before his removal would obviously enable him to accept parish relief for any consecutive period less than one month without being removable.

Judging from the effect of the abolition of some of the grounds of settlement by the new Poor Law, and the constitution of unions with boards of guardians, in reducing the number of removals and expense of litigation, notwithstanding an increase in the expenses of examinations before justices in obtaining orders of removal, produced partly by the act itself, but chiefly by judicial decisions, it may fairly be assumed that the operation of the proposed alterations in the law would be almost to abolish removals, except in extreme

cases which have been alluded to, such as an influx of Irish, or a sudden congestion of pauperism produced by manufacturing vicissitudes: a more uniform mode of administering the law would be introduced; practically perfect freedom would be afforded to the circulation of labour; the industrious and enterprising labourers would be encouraged, while the idle would fare no better than at present; labour would become more effective; more effective labour would increase the demand for it, and the capital which employs it; and the result to be hoped for would be a considerable decrease of pauperism, and an amelioration of the condition of the poor.

ART. IX. — MR. O'CONNELL.

THE decease of an eminent professional man requires, of course, some notice in this journal. It is necessary to premise that with Mr. O'Connell's politics, his conduct either as a member of parliament or an agitator out of doors, we have properly nothing to do. It is the lawyer and not the demagogue who alone can occupy us here, and whatever opinion we may entertain of him in the latter capacity, we have now no vocation to state it, or even to allude to the matters on which it is founded, unless as making part of his general character. In that sense they cannot be passed over.

Mr. O'Connell was a very distinguished advocate. Called to the Bar fifty years ago, he practised with great success, and, like most Irish barristers, in all the Courts. He began by acquiring reputation in criminal trials and on the Munster circuit. He afterwards often appeared in the Court of Chancery; but it was chiefly in the Common Law Courts that he distinguished himself. Few men in Ireland ever attained a larger share of practice, and he was eminent alike for diligence, and for discretion in the conduct of his extensive and various business. When a late Chief Justice was asked if he would place O'Connell at the head of the Bar (it was after Plunkett's elevation to the Bench), he said the question was

an improper one: "he practises" (said his Lordship) "in my Court." "But," said the questioner, "if you had a cause yourself, whom should you retain?" In his capacity of a client, the judge made answer without hesitation, "Mr. O'Connell."

Mr. O'Connell was indeed a very considerable advocate. He was sufficiently versed in the common matters of the profession, and knew the practice of the Courts. Without being a profound or at all a learned lawyer, he knew enough of ordinary practice to carry on the forensic war with success, especially at a Bar not abounding greatly in eminent masters of law. His industry, which was indefatigable as his habits were sober—his readiness and skill, which were never at fault—his discretion, which was signal and never broken in upon by his somewhat violent temper—all concurred to make him a safe, and therefore a successful, advocate. As a speaker he was far above mediocrity, though almost as far below the highest order. He could neither be named with Curran for impressive eloquence and brilliant fancy; nor with Plunkett for the union of powerful reasoning and chaste and striking imagery; nor with Bushe for suavity of delivery and exquisite diction; nor even with Flood for graceful discourse. But he was clear, and he was eminently concise; more so than almost any leader whom it has been our lot to hear; but we have never heard either Plunkett or Bushe.

We recollect the well-known case of *Macabe v. Hussey* being argued by him for the appellant, in the House of Lords, on a memorable day—the morning after the defeat of the Reform Bill, 7th October, 1831. The Chancellor of England (Lord Brougham), of Ireland (Lord Plunkett), and Lord Radnor were the peers who attended, and all expressed their unqualified approval of Mr. O'Connell's argument. Nor was anything more remarkable in its great merits than the extraordinary conciseness of each portion. The case was memorable on account of its close resemblance to the English one of *Beasley v. Hugonin* (reported in 11 Vesey Jun.), which gave occasion to Sir Samuel Romilly's most celebrated argument, and one of the most able speeches ever made at the English Bar. It was that of a dishonest person who had entrapped an old lady of no very strong intellect into making

over to him her property, by various stratagems and a long course of fraudulent conduct, such as pretending to be her nephew, she having a son and other near relatives. There was this difference in the position of the two advocates, that Sir Samuel Romilly was for the family against the knavish interloper, and Mr. O'Connell had to sustain the case of the villain. He failed. The decree was affirmed, and we understand the party made his escape to avoid obeying it; nor has ever been discovered or made to pay more than 6000*l.* out of 60,000*l.*, which he still wrongfully and most dishonestly retains, flying from town to town on the Continent, while he spends Dr. Hussey's money, in whose favour the decision was given.

We stop for the moment to note this most grievous defect in the laws municipal and international of our civilised times. When peace happily prevails, it brings with its numberless blessings this serious evil, that the execution of the laws is suspended in neighbouring states by the facility of flying from the sentences of Courts, Criminal as well as Civil. When an offender can escape from justice by withdrawing across the frontier of the country whose laws he has broken, we can hardly say that those laws have any force. Accordingly, at various times treaties have been made by neighbouring states for the mutual surrender of persons charged with grave offences. But the catalogue of these has generally been confined to murder, forgery, and fraudulent bankruptcy. However, we have reason to know that though the French authorities easily and readily give up our criminal fugitives, there is not the same, or, indeed, any facility of obtaining the reciprocal surrender of French fugitives. The treaty has become almost a dead letter here, and the result must be that we shall speedily cease to have the power of pursuing our culprits into France. What can be more barbarous than this state of things? Does not the bare act of flight, of absconding, furnish in itself a sufficient ground for apprehending the fugitive, and, at least, subjecting him to examination; and if he fails to satisfy the magistrate, for sending him home to his trial? But all offences should come within the same description, except perhaps those of a political kind; and debtors as well as criminals should be delivered up.

This becomes the more easy now that imprisonment for debt is abolished, and all that can befall a captured debtor is the being compelled to surrender his property or disclose its situation; so that it may be made available to pay his creditors their just debts. Nothing surely can be more absurd, nay, more barbarous, than that all persons indebted should be suffered to establish themselves at Boulogne or at Brussels, forming colonies of fraudulent debtors, who, instead of paying their creditors, choose to spend the money of those creditors, and set the law at defiance. Such enormous abuses cannot surely be much longer tolerated. It is wholly inconsistent with any state of law under which civilised communities should consent to live. We have been accidentally turned aside from our subject, and we return to it.

Mr. O'Connell suffered, like all Roman Catholics, both in civil and military stations, from the penal laws; and he was kept from the rank to which he was entitled, and which still more his seniors at the bar were entitled, to have conferred upon him. This exclusion continued until the year 1833, when the government, most properly, made him a King's Counsel.

At this period, however, he had nearly ceased to rank among practising barristers. Politics had taken the place of law in his estimation, and he soon after gave up all connection with the profession. This was an act of consummate imprudence on his part: for he had very little private fortune, and he had realised hardly anything by his legal success. Hence he became at once deprived of resources, with a large and expensive family, and other kindred to whom he was uniformly generous. Recourse was therefore had to a subscription; and this, under the names of tribute and testimonial, continued to be collected for his support yearly, by the agitators lay and clerical, but chiefly by the Catholic priests. He had ten years before organised an association which was put down by act of parliament, as dangerous to the public peace. The Catholic Emancipation was at the same time granted; and he had contributed more than any other person to this event, although neither he nor his coadjutors ever remembered — at least they never chose to mention — the

large sacrifices, as well as the powerful exertions made to further the same object, by the statesmen who always had proved the friends of toleration — exertions, without the benefit of which, Mr. O'Connell and his associates never could have made any progress in accomplishing their just and lawful end. It must also be borne in mind, that while these statesmen made the greatest sacrifices which ambition can endure, embracing the exclusion from all power for above twenty years, Mr. O'Connell and his fellow agitators, lay and clerical, made no sacrifice whatever, but were all the while both secured from loss if they failed, and greatly benefited if they prevailed. Towards these his precursors, without whose powerful aid he could have effected absolutely nothing, Mr. O'Connell never showed the smallest gratitude: on the contrary, he assumed the whole merit and the whole triumph to himself; and he was at all times ready to turn round upon his Whig and Liberal allies, holding them up with measureless abuse to popular indignation whenever it suited the purpose of the hour. His habit of vituperation, indeed, alternating with clumsy and overdone flattery — nay, boundless fawning — together with the *looseness of statement* to which he habitually resorted as often as it could serve his purpose, was the worst feature of his character. He was a man of friendly feelings; in his family he was affectionate, and he was beloved. It was a gross fault of his system, if such it could be called, that he pledged himself at any moment for the purpose of the occasion to any course of conduct how violent or senseless soever. Not only was the motion for repealing the Union to be brought forward session after session, and all other considerations sacrificed to it, but he was pledged again and again to bring forward a scheme for reforming the House of Lords, against which he undertook a kind of crusade in the summer of 1835, going round the country to abuse that body. Nay, having named a day for making his motion, and having put it off for a fortnight, he declared that no earthly consideration should induce him to delay it an hour longer if he were alive. Yet none of these things did he ever bring forward, except once the Repeal in 1834, and that by absolute compulsion of its

adversaries, who would not suffer him to escape from his threats; and he then enjoyed the memorable singularity of having but one single member not Irish to vote for his wild plan, in a house more than ordinarily full.

These things it was necessary to state in giving a sketch of this remarkable person. But great as these faults were, and low as they placed Mr. O'Connell's character in the eyes of all reflecting men, they did not prevent him from playing the part of a Leader of the people with singular power and great effect; playing it, too, for a much longer period of time than any one could have believed possible. He had for acting this part many great qualifications. He was ready in speech, of consummate self-possession, never to be abashed or daunted in debate, fertile in giving out good-humoured jokes. He was besides good-natured in private, and of easy access. His domestic habits were those of a kind father and brother. His public efforts were marked with an inflexible perseverance, and he had a sanguine temperament that set at defiance repeated defeat. He never committed the fatal error, to mob leaders the most fatal, of balking the expectations or chilling the zeal of his followers, except once, when the jealousy of the honest but misguided party of Young Ireland made him, who had so long been preaching sedition and almost rebellion, discover that all agitation must be, at all events, all costs, and all sacrifices, peaceful. But this step he never could retrace: it destroyed his whole influence, save that which the priests deemed it for their own interest to preserve in him; and he really was, during the short portion of his life which remained, reduced to comparative insignificance.

It would have been infinitely better for Mr. O'Connell had he remained in the profession, for which he had very great talents, and in which he had eminent success. His quitting it was the great error of his life. He lost much of his influence, and still more of his respectability, when he became a trading politician; for he lost his independence, and was reduced to rely for his income upon the contributions of the people, obtained partly by pandering to their prejudices, and partly by the unworthy influence of the priests. The refusal

of high judicial office was a second error consequent on the first. It is not true, as we believe, we may say know, that the Chief Baron's place was ever offered to him. The only ground for the statement was that an Attorney General, when the office was vacant, asked him if he was a candidate, when he said certainly no; for a person who had had the misfortune of killing a man in a duel never could administer criminal justice. The answer did him great honour; but the Attorney General only spoke for himself, and only said, that if Mr. O'Connell was a candidate he should withdraw his own claims. He had no kind of authority to make the offer. The Mastership of the Rolls was certainly offered to Mr. O'Connell, and declined. The reason of his refusal was, that he could not afterwards have sat in parliament; and, of course, when on the bench political agitation was impossible.

ART. X. — CONTROVERTED ELECTIONS.

7 & 8 Vict. c. 103. *An Act to amend the Law for the Trial of controverted Elections of Members to serve in Parliament.*

IN a former number¹, we called attention to the evils resulting from the practice of Parliament interfering by special legislation on behalf of individuals inconvenienced by the operation of general laws, and suggested the transfer to some proper tribunal of most of the really judicial functions now exercised by both branches of the legislature; and pointed out, especially, the necessity and propriety of the House of Commons abandoning its assumed privilege respecting the decision of controverted elections, showing that that privilege had the effect of enabling the majority of that House to determine the return of every member, and the rights of every constituency, and so to choose both itself and its electors, and was inconsistent with all principles of reason, law, and justice, and with every recognised theory respecting the constitution of either House, and that prior to its assumption, when the

¹ See 4 L. R. p. 292.

right to a return was disputed between rival candidates, that right was disposed of by the ordinary courts, and according to the ordinary forms of law, juries determining questions of fact, and the judges questions of law; and detailed the mode in which this might be done again with equal advantage to the House and the community. We now proceed to combat the pretences on which this jurisdiction was assumed by Parliament, and to prove that, instead of its answering any one of the ends for the sake of which its assumption was justified, and its abandonment is now resisted, it sapped the independence of the House of Commons, destroyed the electoral rights of all the ancient civic constituencies of the kingdom, and reduced the country to the state from which it was found necessary to redeem it by the Reform Bill.

It is usually considered that the Commons were compelled to assume this privilege in self-defence against the encroachments of the Crown. But on reference to the journals, it will appear that the crown aided in its assumption, and afterwards lent its power to uphold it. The officers of Elizabeth's government supported the exercise of the "privilege as to elections," as then claimed. Of the committee of twelve appointed on the 24th of February, 1580, to examine precedents, four were, "Mr. Treasurer, Mr. Chancellor of the Duchy, Mr. Treasurer of the Chamber, and Mr. Attorney of the Duchy."¹ Whatever motive induced Elizabeth in the Norfolk case (if Dewes be right) to reprove them for interfering, yet she never afterwards attempted to check them. James, "*as an absolute king,*" had by proclamation forbidden the election of outlaws and other bad characters, and was, it is said, anxious for the return of Fortescue; but after that case he never interfered.² Nay, some of the officers of his government formed part of every committee which sat during the remainder of his reign. After the Restoration, the Court party were so anxious to uphold this privilege, and the exclusive jurisdiction of the Commons, that when Hale and his col-

¹ See Com. Journ. for March 18. 1580.

² When the Committee of 1623-4 was about to restore some ancient boroughs he thought to prevent them, but on consulting the Judges, and their determining in favour of the ancient rights of election, he proceeded no further.

leagues, in the King's Bench¹, gave judgment for the plaintiff in *Barnardiston v. Soame*, which was an action against a sheriff for a double return, they raised to the Bench the counsel who had been employed for the defendant, by them reversed in the Exchequer Chamber the judgment of the King's Bench, and thus confirmed the exclusive right of the members of the Pensioned Parliament—to elect each other.² When the Aylesbury case occurred, we find the members of the government voting in support of this exclusive jurisdiction, and the Solicitor-General adding the weight of his official character to the extravagant claims of the Commons. Is Wilkes's case already forgotten? When the Grenville Act was proposed, we find Lord North, his Attorney-General, and other official friends, straining every nerve to preserve this "ancient and undoubted privilege of the Commons," and declaring their belief that the house could not, by act of parliament or otherwise, deprive itself of a privilege, which was of the "very essence of its constitution."³ When we thus see the Court party always supporting this privilege, ought we not to be doubtful, at least, of its tendency to secure the purity and independence of the Commons?

The slightest consideration of the subject will show, that it was of the very opposite tendency, and calculated to destroy every vestige of independence, by making the seat of every member, and the rights of every constituency,

¹ Swysden and Wylde; Rainsford doubting. See the case in 6 State Trials, 1063.

² There were three Judges then made in the Exchequer, and two in the Common Pleas (Id. vol. xiv. 745.). Eight being the total of the two courts, we find C. J. North, who had been leading counsel for the defendant (Ib. 721.), and who was afterwards selected to try the *quo warranto* against the city of London, and five others reversing the decision of the King's Bench. *Barnardiston*, in his petition to the House of Lords, alleged that it was by North's solicitation the judgment against him was obtained (Ib. 720.). From the assumption of this privilege to the passing of the 2 G. 2. c. 24. we have not met a single instance of any respectable Judge declaring plainly, explicitly, and directly, that the Commons had any rightful jurisdiction over the determination of elections; even North in delivering this judgment did not pledge his own opinion to the doctrine, but qualified it with an "it is admitted," &c. &c., while Hale, Willes, and Holt maintained the supremacy of the common law whenever the question came before them.

³ Parl. Hist. vol. xvi. 907. 10. 11. 13. 15.

dependent on the will and pleasure of the royal or ministerial majority. Under this new doctrine of the law of parliament, the election of a member, or, as it was facetiously called, the trial of an election petition, being considered as legitimate an object of contention in the House as at the hustings, or as the election of the speaker, or the voting of the supplies, or any other party question, and being decided in precisely the same manner, it is obvious that this privilege gave a great advantage to the crown over every other party, independently of its influence with the sheriffs. For as the Crown, by reviving old boroughs or chartering new ones¹, or by other means, with the history of which our readers are familiar, could, in all ordinary times, command a majority, it could gradually vote its opponents one by one out of the House, by declaring them unduly elected, till it was made perfectly secure; and, again, as the Commons had the sole and exclusive right of determining the validity of their own elections, and all questions in any way relating to the same, and sheriffs could be questioned respecting improper returns by them only, it could the more easily induce sheriffs to return its friends, as these belonging to the majority would be declared duly elected, could indemnify and reward the sheriffs, and assist in unseating those really chosen by other constituencies. This was the motive imputed to the court party at the time of the reversal of Hale's judgment in *Barnardiston v. Soame*, and it was the fear of this that caused the passing of the 7 & 8 W. III. c. 7., immediately after the confirmation of the judgment of the Exchequer Chamber by the House of Lords after the Revolution. This privilege gave the Court party, also, this further advantage, that, as the electors generally believed that the ministers would be in a majority, they thought it useless to vote for the opposition candidates, and also dangerous to their own elective rights, as the ministerial majority might at once disqualify every one of them, and transfer the franchise

¹ Edward VI. thus brought into the House 48 new members, Mary 21, Elizabeth 60, James I. 27, Charles I. 18, and Charles II. 6. Glanville's Rep. Intro.

to some new class of voters. Hence the ministers were always sure of obtaining a majority in the House, or at the hustings, and hence arose their attachment to this constitutional privilege.

It must not be forgotten that up to the time when the Commons assumed this jurisdiction there was not a single complaint as to the mode in which the right of return had been previously determined between two rival candidates. If the Commons could, in the course of the discussions respecting Goodwin's case or any of the preceding cases, have pointed out a single instance of abuse, they would have gladly done so. We may therefore well agree with Prynne, that they assumed it solely in the wantonness of unresisted usurpations, and to abet their own factious purposes. Scarcely had it been conceded to them when we find them suspending an obnoxious member for three months on a pretended doubt as to whether a purveyor could be a member¹, and resolving that thenceforth no mayor should be a citizen or burgess.² In this manner from that day up to the passing of the Grenville Act, with the exception of a short interval in the reign of James I., they almost invariably exercised this privilege, determining every case by party spirit and personal predilections. They were not on oath, nor were the witnesses, and therefore neither had an excuse for squeamishness. Every question regarding a seat was decided like any other party question, and not only was the candidate who was acceptable to the majority of the House declared duly elected, but if he were a citizen or burgess such a franchise as suited his purposes was established in the city or borough which he had the honour to represent. This is so notorious as not to require proof: however, we shall give it. Prynne says that in his day "the committee of privileges touching elections" was "for the most part very partial, and for that cause usually styled THE COMMITTEE OF AFFECTIONS: he that can make most interest and the strongest party being sure to carry the election, both at the committee and in the House, though

¹ See Com. Journ. for 3d April, 1603, case of Griffin Page.

² Ib. 25th June.

never so foul.”¹ Tindall (*Continuation of Rapin's History of England*) thus describes the way in which the privilege was exercised at the time when the Aylesbury case occurred: “And when these matters came to be examined by the House of Commons, they gave the election always for him who was reckoned of the party of the majority, in a manner so barefaced that they were scarce out of countenance when they were charged for injustice in judging elections. It was not easy to find a remedy against such a crying abuse, of which all sides in their turns, as they happened to be depressed, had made great complaints; but, when they came to be the majority, seemed to forget all that they had before exclaimed against. Some few excused this on the topic of retaliation, alleging that they dealt with others as they dealt with them or their friends.” In 1707-8, so lost were they to all shame in thus deciding elections without regard to anything but their own party feelings, that it was made a standing order, “That all questions at the trials of elections shall, if any member insist on it, be determined by ballot.”² So worried and shamed were they at length by the interminable contentions arising from the fact that the rights of election in each borough varied according to the politics of the House and the candidates, that by the 7 & 8 Will. 3. c. 8. they prohibited the sheriffs from returning a member contrary to the last determination of the House as to the rights of election, and by the 2 Geo. 2. c. 24. enacted that they themselves also should be bound by the last determination. Sir Robert Walpole looked upon the decision of the House against him respecting the election for Chippenham in precisely the same light that a minister would now look upon a direct vote of want of confidence, and Mr. Grenville at a later day said, with reference to the system, “I will endeavour to give some check to the abominable prostitution of the Commons in voting for whoever has the support of the minister, which must end in the ruin of public liberty if it be not checked.”³

¹ Plea for the Lords, p. 413.

² Com. Journ. vol. xv. p. 551. c. 1 and 2.

³ Parl. Hist. vol. xvi. c. 905. note.

A comparison of the state of the franchise in the cities and boroughs of England when this privilege was first assumed, with what it was when the Reform Bill was proposed, will prove to demonstration that this privilege destroyed the popular rights of election and the independence of the Commons, and if not checked would, as Mr. Grenville said, have ended in the ruin of public liberty.

At the accession of Henry VIII. there were 111 towns sending 224 representatives, and by him and his successors 36 were restored.¹ Of all these one only was empowered by charter to send representatives², in the rest the right of election was dependent on immemorial usage or the Common Law. In modern times, after the House of Commons had by its decisions brought the rights of elections into a state of inextricable confusion, it has been often said that the franchise in counties was at all times confined to freeholders, and in towns to burgage-holders, but there is no one early authority for these assertions. Coke, we know, continually refers to freeholders as the electors at common law of knights of shires, coroners, and other officers, but we have been curious to look into every reference which he gives, and not one of them makes the slightest allusion to the freehold qualification of the electors. It seems clear from other authorities, that before the 8 H. 6. c. 7. the same qualification existed at common law in towns as in counties, except where there was a prescriptive usage to the contrary, and that in neither was it limited to freeholders. Prynne states that before the 8 Hen. 6. c. 7. "every inhabitant and commoner in each county had a voice in the election of knights, whether he were a freeholder or not."³ This statement is supported by the language of all the preceding statutes, which direct the sheriffs to make election by the suitors in the county courts, "and all others of the counties," without particularising any species or amount of property to qualify them;

¹ 10 by Edw. VI., 2 by Mary, 6 by Eliz., 8 by James I., and 9 by Charles. See Willis's *Notab. Parliam.*, second edition, Preface to vol. i. pp. viii. ix. xi., and Glanville's *Rep.*, *Introd.*

² Wenlock.

³ *Brev. Parl. Pred.* p. 186. *margin.*

and particularly by that of the 8. H. 6. c. 7., which recites that "ALL, *who came*, claimed an equal right with the most wealthy knights and esquires;" and is confirmed by the celebrated committee of 1623-24, the only one which ever sat whose opinions are entitled to respect. This committee consisted of fifty-nine men, "the most eminent for legal and constitutional knowledge that were ever united in such a body."¹ Among them were Coke, Selden, and almost every other commoner of that day distinguished for a knowledge of the laws and constitution of the country. The reason for selecting such eminent men is stated in the introduction to Glanville's Reports in the following manner. The number of controverted elections having greatly increased in the two parliaments preceding 1623, "made many of the ablest men of those parliaments agree in opinion that some certain *rules* or *great outlines* of the legal rights of voting were become necessary to be laid down, as a guide and direction to the electors and candidates in the country, and as a remembrance of the *reasons* and *grounds* upon which the determinations of the House were grounded."² This committee decided that where there is no certain custom, or prescription, or "constant usage beyond all memory," recourse must be had "to common right, which, for this purpose, was held that *more than the freeholders only* ought to have voices in the election; namely, *all men, inhabitants, householders, residents within the borough*."³ Such was the right of election at common law, in at least the 149 ancient boroughs of the kingdom; and such of the newly created boroughs as had no other franchise particularly specified in their charters, when the House of Commons began to exercise this jurisdiction over the rights of its constituents; and though by a declaration of another committee of that reign, "nothing could take it (the ancient common-law franchise) from them but prescription or constant usage beyond all memory,"⁴ yet

¹ Hallam, C. H. vol. ii. p. 384.

² Page vi.

³ Glanville's Rep. Case of Pontefract, p. 107. Case of Cirencester, p. 142.

⁴ The Boston Case, 2 Dougl. History of Contested Elections, 220. See also 232. 291.

from how many did that House itself, by the aid of this privilege, take it? From every one of them. At the time of the passing of the Grenville Act not a single ancient borough retained its ancient franchise; and after the passing of that act only one of them was able to recover it. This was Pontefract,¹ in which it was established as above in 1624; but it was not enjoyed uninterruptedly. The next period, at which the right of election in that town is noticed, is in 1698, when it was *agreed* to be in those who "have an inheritance or freehold of burgage tenure within the said borough."² This right, modified in 1715 with a further restriction of "paying a burgage rent," continued up to 1783, when, by one of the committees under the Grenville Act, the ancient right of "*the inhabitants householders resiants*" was restored; and after contentions in 1784 and 1791, confirmed finally on appeal in 1793. Thus of all the ancient boroughs, one only retained its common-law right, and was even deprived of it while the decision rested with the body of the House.³ In all the rest the rights of election were limited to persons paying church rates or poor rates, or having a legal settlement, or to freemen by apprenticeship, or to persons qualified by some other new-fangled process, as unknown to the common law as any of the others. To those who may fancy that burgage tenure was the ancient franchise in boroughs, we have only to say that, in 1774, there were only twenty-nine boroughs in England in which the House of Commons recognised that qualification.

Such being the result of the operation of this privilege, few of our readers can suppose that it was calculated to secure the independence of the Commons. Will any one pretend to say that, if the right of election were left determinable as it

¹ Oldfield's Parl. Hist. vol. v. p. 319.

² It appears to have been quite a common practice for candidates to *agree* that certain parties only had a right to vote, and so dispose of the rights of the electors as they would of their own goods and chattels.

³ Even in the case of Cirencester, in which also the committee of 1623 determined the common-law right to be as above stated, the *ancient* right of election was afterwards resolved to be in those having a legal settlement (*viz.* under 13 & 14 Car. 2. c. 12. and subsequent acts).

was in former times by judges and juries, the people of England could be so universally degraded and corrupt as, in less than a century and a half, to disfranchise every ancient borough in the kingdom? It *could* not have been done. Witnesses could not have been got to swear; judges could not have been got to rule; and juries could not have been got upon their oaths to find, that the ancient right of election in a particular borough was limited to persons, for instance, having a legal settlement, a thing for the first time established only by the 13 & 14 Car. II. c. 12.; or paying poor rates, or being freemen by apprenticeship; qualifications which the Statute Book would prove to have existed only since the time of Elizabeth. But what could not have been done by any common law process, was easily and speedily effected by this newly invented "ancient undoubted and constitutional privilege."

When the reader recollects how the committees under Sir R. Peel's act, the 9 Geo. 4. c. 22. — committees consisting of the eleven least exceptionable members of a balloted list of thirty-three—sitting in public, bound by oath to decide according to the law and the evidence, and required by public opinion to act conformably with that oath, with a bold and vigilant bar to resist and criticize corruption, and dozens of reporters to secure it notoriety, could not help exhibiting their *political bias*; and when he recollects that the late committee of seven, though chosen with every possible safeguard against the temptation to exhibiting that bias, was also suspected of not being immaculate, and that to secure a greater feeling of shame and responsibility, the number was, in 1844, cut down to five; let him ask himself what could he expect from the Pensioned Parliament, or that which made it a standing order that all questions at the trial of elections should be decided by ballot, proceeding in solemn mockery, with their doors closed and their deeds known only to themselves; uncontrolled by the press or public opinion, uninfluenced by any feeling but that of party or personal interest; not sworn, obliged or expected to decide according to law, or to evidence, without even hearing, much less swearing, a

witness, to determine by the mute logic of numbers the merits of a controverted election between a ministerial favorite and an obnoxious opponent. The very absurdity of such a mode of trial, and yet that is the only mode in which the privilege can be exercised in all its integrity, is an argument against the right to assume it. Can the human mind conceive anything more absurd than to see 500 senators, without the slightest regard to law, or truth, or justice; without having the power of swearing a witness; without hearing a tittle of evidence, or caring an atom about it; determining by a mere political vote what was the ancient right of election in the borough of A, and whether John A. Nokes had paid his last quarter's poor rates, or had at any time of his life received parochial assistance, or had slept any of the last forty nights of his apprenticeship out of his master's parish; or was able to spend exactly forty shillings by the year as the clear profits of his freehold; and calling this the administration of justice, and in the High Court of Parliament too?

The fact of its defeating the primary object for which a House of Commons was instituted, is an argument against it. From the history of this country it would seem that the only grievance to which Englishmen would not permanently submit was taxation without representation, or the being deprived of their property without their consent. From this instinctive principle they insisted on being represented in a national council by men of their own choice, to regulate the expenditure of their money. No people ever adopted a system so excellent in theory for attaining such an object; yet, since the assumption of this privilege to the passing of the Grenville act, can we find in the history of man any system so signally failing of the ends of its institution?

Some writers have expressed surprise at the fact of the ministers of the Crown in former times supporting this and other extravagant pretensions of the House of Commons. But there was no cause for surprise. When the ministers had the power of securing majorities at will, they naturally looked on every extension of the powers of their servants as an extension of their own powers; and hence, from the time

of Henry VIII. to the commencement of the present century, we always find them supporting the Commons in all their most extravagant pretensions to privilege against the rights of the people — privilege in the strict sense of the word, *privata lex indulta contra legem communem*; for, in fact, every one of their unjustifiable and extravagant pretensions was directed against the rights, not of the Crown, but of the community; and by no accident has it happened that any one of them was ever exercised against the Crown in defence of the rights of an injured subject. If the reader will reflect that, from the reign of Edward VI. to the Revolution, the Crown had in all ordinary times the power — which the Commons, in Elizabeth's reign, resolved that they ought not to question¹, and which, in the reign of Charles II., they formally recognised, after a long debate, in the case of Newark — of securing a majority by creating new boroughs or reviving old ones, and by other well-known means; and in after times by the same well-known means — he must see that the minister must have been pleased at every extension of the powers of his obsequious instruments; pleased to find them erecting themselves into a Star-chamber, under the title of the House of Commons, and by the mysterious and metaphysical aid of "the Law of Parliament," protecting themselves from all control; placing themselves above every other court in the kingdom; declaring their simple votes to be paramount to all law; voting themselves to be the only protectors of the rights of the nation, and watchful guardians against royal, ministerial, and aristocratical encroachments; and, last and best of all, discovering a "constitutional privilege," by which they would be apparently elected by the people, but, in reality, by each other. Surely the minister who would, under such circumstances, oppose "the Law of Parliament" or "constitutional privileges," would be, indeed, a ministerial curiosity.

Finding, then, that this privilege is opposed to the first principles of the constitution, and to ancient usage and statutes; that it was assumed and exercised for the first time in the seventeenth century, without necessity or justification, and in its exercise proved all but fatal to the independence

¹ See Com. vol. i. p. 83. A. D. 1571.

of Parliament and the popular rights of election; and that it introduced a mode of trial unknown to the law of England, or, indeed, of any other civilised country, and an outrage upon every principle of common justice, disposing of the rights of whole communities in their absence, on the allegations of third parties, without any form of pleadings, without sworn testimony, without judicial forms, by irresponsible persons deciding in secret, and without stating the reasons of their decisions, or even allowing their names to be known; can we doubt that it was like the other unjustifiable usurpations of that period, but was allowed to survive because the Crown found it a convenient instrument for destroying the ancient extended franchises of the people, corrupting the House of Commons and securing permanently its servility and dependence.

It will be said that having been so long in operation, and being now to some degree rendered incapable of doing much mischief, some further attempts should be made to accommodate it to the exigencies of the present times. But we hold that it is so essentially repugnant to every principle of the law of England as not to be susceptible of any modification, which should induce Englishmen to tolerate its continuance. Every successive attempt to obtain a satisfactory mode of trial under it has totally failed. Let us see what those modes were. Before the passing of the Grenville Act, the trial took place sometimes before the whole House at the bar, sometimes before a committee, who reported the facts of the case and its judgment upon them to the House, who affirmed or disaffirmed it at their pleasure. From 1714 to 1770, seventy-nine cases were heard at the bar, and seventy-six by committees, whose reports were affirmed, and nine by committees whose reports were not affirmed. Under the Grenville Act, passed in 1770, the committee was composed of fifteen members, two chosen by the parties, the rest taken from a balloted list of forty-nine, by the parties alternately striking off a name till the list was reduced to thirteen. The committees under this system were soon designated as consisting of thirteen fools and two scoundrels. By the 9 Geo. 4. c. 22. the two scoundrels were dispensed with, and the rest of the

committee reduced to eleven, formed in the same manner from a balloted list of thirty-three; by the 4 & 5 Vict. c. 58. the committee was reduced to seven; by the 7 & 8 Vict. c. 103. to five; and by the next statute on the subject will, we hope, be totally abolished.

ART. XI.—FRENCH JUDICIAL PROCEEDINGS.

THE late proceedings before the French Chamber of Peers on the trial of two ministers, and two others charged with corruption, demand our most serious attention as friends to the purity of the administration of justice, and as anxious wellwishers to the improvement of jurisprudence both foreign and domestic. Many as are the instances which have been given of the defects in the system of our neighbours, and much as we had ever conceived ourselves entitled to hold out to them our own practice for their example, we never saw such matter of observation, such decisive proofs of their inferiority as now; and it would be betraying our duty towards them were we from affected or misplaced delicacy to withhold our free opinion upon their errors.

We conceive some propositions respecting procedure and evidence too clear to require any demonstration, and that the acting upon these is absolutely necessary to prevent the escape of the guilty, as well as a still worse calamity, the destruction of the innocent.

First. The accused should be furnished with a clear and a plain statement of the charge against him, not overwhelmed with a mass, partly statement, partly argument, partly fact, partly comment, partly detail, partly declamation, all mixed up together to bewilder the reader, and all passing and falsely passing under the name of a charge.

Secondly. The charge should be supported by evidence, that is by documents, or by the testimony of witnesses who shall only be allowed to state facts, and facts within their own undoubted knowledge, and facts of which if they knowingly swear falsely, they shall be punishable for perjury.

Thirdly. The documents to be used against the accused should be of one kind, and of one kind only, the letters or

papers written by him, or by his authority, or proved by unexceptionable witnesses to have been known to him, and adopted by him; but any letter or paper written by another, and to which the accused is no party, shall be wholly shut out from the proceeding.

Fourthly. The accused should not be put to the question either in bodily torture, or by examination of the Court, but should be confronted with the witnesses against him, and allowed to examine them, and to comment on their testimony, on which the accused also should be heard.

Now not one of these rules has been observed; but, on the contrary, every one of them has been constantly and ostentatiously violated through the whole of the late strange proceedings.

First, a volume of 123 quarto pages closely printed is flung at or rather upon the unfortunate accused. It consists of facts, rumours, comments, reasonings, declarations; so that it requires extreme labour of the accused to discover what he is charged with, and of the Court to know what is the issue they are to try. No one can say before the trial begins what are the things upon which the evidence is to be adduced; no one can say at the close of the trial what has been proved, what left unproved, what disproved. The parties and the Judges are all left to grope their way in the dark, quite uncertain from first to last. Then, to supply the defects, the accuser is perpetually allowed to declare what the matter is upon which he charges the defendants; what the points are on which he calls for a judgment. Nothing can be imagined more subversive of all justice;—nothing more oppressive to the accused;—nothing more unfair to the Court. Every thing becomes uncertain and obscure; all steps taken towards a decision are at random and at haphazard.

Next comes the evidence. Witnesses are called who tell all they have heard, or have supposed or imagined in their own minds. No exclusion of hearsay, nay, of common report, is made.

But equally bad is the course taken on written evidence. Every letter that any one has written about the subject of the trial seems to be received against the accused. At least,

the letters written by the one of the accused who has escaped and is not on his trial, addressed to another of the accused, is read in evidence, to charge a third of the accused, who is wholly ignorant of the grounds on which the letter was written. Nay, the person on his trial, to whom the letter is addressed, knows absolutely nothing of the contents, except that they charge his fellow prisoners !

Then comes the outrage on all justice and all common humanity ; if possible, still more revolting. The President of the Court and the public prosecutor keep up an incessant fire of cross-examination on all the prisoners ; but more especially the President, armed with all the authority of his high station, and also being the chief of the Judges who are to decide on the case. Not a moment passes that some question is not shot at each prisoner. "What say you to that? How can you deny this? Don't refuse to confess — tell all. Are you a swindler, as you seem to be, or did you only bribe your colleague? Do you really believe your colleague not guilty?" And so forth. Nor is this all. Long, declamatory, impassioned speeches, are constantly made against the prisoners, and made much more frequently by the President than by the public prosecutor. "Why did you appear moved? Why did you seem to shed tears when that letter was read? Answer me that!" — is only one of the various appeals thus made through the whole trial.

Now the inevitable result of all this would have been that the proceedings must have bewildered any professional Judges who had to try the cause. Then what must have been the condition of the Peers, most of whom had never seen a case before, and not one of whom had the least professional experience? Their minds were of necessity bewildered from beginning to end of the proceedings. They never knew well what was the matter in issue. They never knew at all how it was supported or defended. They confounded all assertion with all proof. They mixed up the words of the prisoners with those of the witnesses. They were influenced by the demeanour of the accused. They allowed what one person said, or heard, or fancied, to be the ground of deciding upon the other persons ; and what a fugitive, who

would not stand his trial, had written or said, to be evidence against all who manfully remained to face the accusation. In the whole, the decision has been one of mere haphazard, and no man living can pretend to believe that anything like justice has been done; and if all the accused confessed, it does in no degree lessen our reprobation of such procedure.

ART. XII. — GRIEVANCES OF SOLICITORS.

A NEW association, composed exclusively, as we believe, of attorneys and solicitors, has been formed in the present year. Its committee of management consists of many eminent solicitors, as well of the metropolis as the provinces: we understand they have already been joined by a large number of their own branch of the profession, and have published an address, stating their principles and objects. They thus legitimately come within our jurisdiction.

Certainly, if we wished additional evidence of the progress which the cause of law reform and of many of our own opinions respecting it, is making, we might safely appeal to this document. It has been sometimes supposed, that solicitors as a body are hostile to all change in the law; we have never believed it. It is true that individual solicitors are opposed to law reform, and so are many individual judges and individual barristers; but that this feeling is widely spread among solicitors we do not believe, and we know that many most valuable services to the cause have been performed by members of this class, of which our own pages, to carry the proof back no further, contain sufficient evidence. But if, heretofore, any doubts were entertained on this subject, we conceive that this address is sufficient to dispel them.

Let us see what it says as to this:—

It states, that on the 25th of March last the gentlemen who originated this movement resolved, that “an association be formed for the purpose of promoting *the interests of the suitors, and the better and more economical administration of the law*, of obtaining the removal of the many and serious grievances to solicitors, *and through them to the suitors*, and of

maintaining the rights and increasing the usefulness of the profession." "In common, therefore," the address says, "with the rest of the community, and indeed in a much higher degree, they are interested in promoting sound and well-digested reforms; and, as the sole representatives appointed by the suitors, charged with the protection of their interests, and essential agents in carrying out whatever in those reforms, or in the general administration of the law, is of public utility, they might fairly expect that their experience should be consulted, that their own position should be maintained and improved, and their rights, as a profession, protected."

Now, if our readers have done us the honour to pay attention to the doctrine which we have held on this point, they will find that it is nearly identical with this. It is impossible to maintain any part of the law or of legal procedure for the benefit of the lawyer. The interest of the suitors is not only paramount, but exclusive. But then, undoubtedly, we are most effectually protecting that interest when we secure for the suitor an able and competent solicitor for his service. If, indeed, it be possible to dispense with the lawyer altogether, then let us do it by all means; but so long as the lawyer is necessary, we are for having the best solicitor, just as we are for having the best barrister, the best physician, the best judge, that it is possible to obtain; and why? let the address give us the answer:—

"There can be no doubt, indeed, that the duties performed by the Attorney and Solicitor are of indispensable utility to the public—to their convenience—to their necessities—to the wants and exigencies of an extended commerce, and an advanced state of civilization. The vast and complicated affairs of the various classes of society, in a large and wealthy country, governed by a multiplicity of laws, cannot be well understood, nor safely managed, without the constant aid of an intelligent body of men, well versed in the principles and practical application of those laws. Every new complication of social growth, every advancement of civilization, by the mere operation of the principle of the division of labour, makes such a body more needful. The Attorney is called upon to advise as well on the expediency as on the right of commencing or defending actions; to consider both the legal principles involved in the case, and various technical matters in the outset

and conduct of the proceedings, and to anticipate and weigh the evidence by which the client's rights must be finally supported. So, in the institution or defence of suits in equity, the Solicitor must be familiarly acquainted, not only with the intricate machinery of practice, but with the nice and subtle principles which have regulated the decisions of courts of equitable jurisdiction. Again, his legal knowledge, experience, and judgment are required in framing complicated wills, conveyances, and marriage settlements, and in the investigation of the titles to landed estates, which often involve abstruse points, and property of great magnitude. The Solicitor is not able, like the Barrister, to limit his practice to a single department, whether of Common Law, Conveyancing, or Equity; he must possess a general, if not a profound, knowledge of every branch of our complicated and extensive system of jurisprudence.

"It is not generally considered, although the fact is unquestionable, that to the agency of Solicitors is confided the administration of the whole real and personal property of the United Kingdom. A large portion of it, which is administered by Courts of Equity and in Bankruptcy, meets the view of the community, chiefly by means of the public journals; but the far greater residue is administered by Solicitors away from the eye of the public. Nor are his services confined merely to the *pecuniary* interests of the client. An Attorney has often to exercise his skill and judgment to adjust disputes and to reconcile the differences that disturb the peace and peril the happiness of families, and to deal with questions that touch the character and reputation of a client, affect his personal liberty, and endanger, it may be, even life itself. In a word, the services they render are co-extensive with the transactions, the rights, the duties, and the wrongs, of all classes of civilized society; and even where the aid of Counsel is called in, it is still to the Solicitor, and to him only, that the client confides his interests.

"If this be a correct outline of the part which the Solicitor is called upon to perform, are not the public, it may fairly be asked, deeply interested in the character and abilities of so important an agent—interested, therefore, that his just claims should be allowed, his rights maintained, and that the education and discipline which are to qualify him for the skilful and faithful discharge of his duties, should be promoted and improved? Nor are these subjects unworthy of the serious attention and protecting care of the Legislature."

This being so, let us see what has been the chief reason for the formation of this association. It is to redress grievances. Now, what is complained of?

1st. Taxes on justice in the shape of fees : we shall all agree in this : —

“ Taxes on Justice in the shape of Fees. — These are paid at every stage of a cause, and fall in the first instance on the Solicitor, but ultimately on the suitor. The officers of the Court who receive these fees are not responsible for the accuracy of the process which they stamp, or of the pleading which they enter. Their duty begins and ends in an operation purely mechanical. The suitor derives no benefit whatever from the payment, and they are to him a mere dry and useless tax. The impolicy of the *Stamp Duties* on law proceedings has been acknowledged, and they have been swept away ; the impolicy of these taxes on justice is equally obvious. Why, therefore, should they be continued? In the administration of the criminal law, not only are the Judges and officers paid from the public revenue, but often the costs also of the prosecutor, his witnesses, Counsel, and Attorney. In actions and suits respecting civil rights, to the occasional enforcement of which all property owes its value, it is surely enough that a party should be driven, in the establishment of his rights, to the necessity of a lawsuit, with its attendant expense of adducing proofs and employing Attorney and Counsel, without being compelled to contribute, in addition, to the general administration of justice.”

In the first article of the first Number of this Review¹, which contained a general declaration of our views, we said, “ The expense of the judicial establishment should be defrayed by the state, and not by suitors ; that is to say, the suitors should not pay for the establishment, by which their causes are tried either by fees, or by stamp, or other taxes on law proceedings.” If rumour tells true, there will be a startling confirmation of these views in the evidence before Mr. Watson’s committee as to Fees in courts of law and equity. It has been shown, if we are not misinformed, that this head of grievance has grown into Hydra, and that the hands that receive these fees can belong only to Briareus.

The next grievance is thus stated : — “ Crude legislation has fastened upon our already overburthened legal code ;

¹ 1 L. R. p. 11.

many ill-digested and ill-constructed statutes, the fertile sources of perplexity to judges and practitioners, and of litigation and expense to suitors. We have seen a great deal of our ancient polity either altered or destroyed, and yet little substantial good effected, and all recourse to the Court is nearly as expensive, dilatory, and oppressive as ever." Alas! who can gainsay this? But, then, here some distinction must be made. Legislation is a science beset with peculiar difficulties. In most of the physical sciences you can experimentalise without danger, except to the person practising the experiment, and, at most, a limited number of persons. In chemistry, for instance, a man risks only his own health, or life, and possibly that of the persons in the same dwelling-house; a thousand experiments may be made, and nobody be the worse or the wiser, and at last some result may be obtained. But in legislation every experiment is an act involving consequences to others. The act can only be inoperative by entirely failing in its object. But if it is to take effect at all, it carries with it the omnipotence of parliament, and until it fairly comes into operation no one can tell its precise effect, or how it may be construed. All acts, and more especially acts affecting the practice of the law, have a double effect,—the effect intended by the framer, and the actual effect when the statute comes into operation. These are the difficulties which are inseparable from legislation; and it must often happen, that the truth can alone be arrived at by a series of tentative measures. Of course, this is to be much deplored; but unless the act can be accompanied by some authoritative explanation of its intention, which is to bind every body, we do not see how conflicting opinions respecting its operation and construction are to be avoided: the only remedy that we see for what is called crude legislation, and we do not know that that would be a complete one—is the establishment of a Revising Board for bills; and in this, so often recommended in these pages, we hope to have the co-operation of the body on whose address we are commenting. Let us also take care to distinguish between the dislike of crude legislation and the dislike to all legislation.

The third grievance is stated as follows:—

"3. Exclusion of Attorneys from Offices of Honourable Distinction. — By several modern legislative enactments, Attorneys have been excluded from public offices which they formerly held. Among these may be particularly mentioned Bankrupt Commissionerships, Lunacy Commissionerships, and Local Judgeships. Again, by the Small Debts' Act (9th and 10th Vict. c. 95.), the Judges are to be selected from a body whose only required qualification is, that they shall have been called to the Bar seven years, such call involving no condition of previous legal examination or knowledge. By this means, contrary to the whole policy of modern legislation, the choice of Judges is confined to one particular class, and the public is deprived of the services of other competent persons who have hitherto presided, and very ably and satisfactorily, over similar Courts. To innovate upon the rights of the Attorney and Solicitor, and to degrade him from his fair position, has not *always* been the prevailing policy. Many statutes may be found which acknowledge the eligibility of Attorneys for these judicial situations. In particular, the 7 & 8 Vict. c. 96., and the 8 & 9 Vict. c. 127., authorised not only Barristers but Attorneys to act as Judges in the execution of those statutes; and numerous bills have from time to time, from 1827 down to the last session, been brought into Parliament by members of the Government wherein Attorneys and Solicitors were proposed as Judges of the intended Local Courts. Until lately no objection was ever made to the fitness and capacity of that branch of the profession to discharge the duties of the office, and no charge whatever, either for want of character or ability, has been established against the gentlemen who have held these appointments. Why they should have been placed under the ban of modern legislation, is a question more easy to ask than to answer."

This is a statement of facts which cannot be disputed, and we think it well deserves the attention of the Legislature.

The fourth is of the same nature: —

"4. Solicitorships to Government Boards. — Amongst the offices which peculiarly belong to Attorneys, and of which they have been wholly or partially deprived, may be mentioned Solicitorships to Government Boards. These were formerly held by Attorneys and Solicitors, a usage which it required an Act of Parliament to alter (9th Geo. IV. c. 25.); and it may be observed, that, whilst the statute affects to throw the office open, it has most commonly been filled by Barristers — *how unfitted for many of the duties*

thus thrown upon them, the records of public boards, if divulged, would proclaim. According to the ancient regulations of the Inns of Court, Barristers, by undertaking such offices, would have been disbarred."

We think the sentence in *italics* should not have been inserted without some proof. The force of the statement depends on the "*if divulged*," and until the unfitness for duties is divulged and established, we apprehend that nothing can be made of this.

We pass to the fifth grievance: —

"5. *Exclusive Regulations of the Inns of Court.* — By the rules of the superior Courts, Attorneys and Solicitors were formerly *required* to be members of one of the Inns of Court or Chancery. The Benchers of modern times, however, have excluded Attorneys and Solicitors and their articulated clerks from admission into these Societies. The reason for this prohibition seems nowhere satisfactorily stated. It surely cannot promote the public advantage, that Attorneys should be debarred from advancement in their profession; for whatever raises them in the scale of intellect and honour, must, as already shown, contribute to the public good. Moreover, it is one of the first principles of a free State, that in whatever department of life a man may choose to exercise his talents, his course should be free and unobstructed. The question, how far any private irresponsible bodies should have the sole custody of the key to important branches of public occupation, must ere long have serious public consideration. No other occupation but the upper branch of the law is placed out of all legislative control."

Here we certainly agree with the complainants. The Inns of Court are at length beginning to awake to a sense of their duty. A course of public education is about to be instituted. It is to be observed, however, that attorneys are excluded from the lectures about to be delivered. We are not now entering into the question whether this be right or wrong; we are merely stating it as a fact. But this surely must be true that, if the Inns of Court refuse to educate the more numerous branch of the profession some other provision ought to be made for the purpose. We are aware that valuable lectures have been delivered at the Law Society, but

they are confined, if we do not mistake, to some particular branch of the law, and do not embrace a systematic course. That the new association does not consider them sufficient appears from the following passage of their address, in which they recommend an improvement:—

“As a means of raising the intellectual character of the profession, the Committee recommend that a higher degree of classical literature, of science, and general knowledge, than is ordinarily possessed, should hereafter be required, before the clerk is allowed to be articulated. The examination, also, as to the principles and practice of the law, should gradually be improved, become more extensive and stringent; and, with a view to excite emulation, a further examination might be instituted for the purpose of conferring some mark of honour on candidates who should distinguish themselves by a profound and accurate acquaintance with the various topics of general and legal knowledge. Such a measure would probably go far to secure the after success in life of those most likely to be an honour to the general body.”

The sixth head touches a still more important change:—

“6. *The Right of Attorneys to act as Advocates*, though restricted much within its ancient limits, has, until recently, been recognised in several Courts of Quarter Sessions, before Bankruptcy Commissioners, and in Courts for the recovery of small debts. Owing to this privilege the suitor had the power of saving considerable expense; and the means of honourable distinction, conferred by intellectual and legal attainments, were placed within the reach of the Attorney. This right has been gradually invaded and circumscribed within narrower limits, — a restriction which has already led to a great increase of tax upon suitors, and this has been rested upon principles which, if fully carried out, would lead to the entire extinction of the right itself. In several Courts of Quarter Sessions, where Attorneys have till recently practised as advocates, they have been superseded by Barristers; and the legislative security for the right of advocacy before Commissioners of Bankrupts, which is conferred on London Solicitors by 1st and 2d Wm. IV., c. 56. s. 10., has been withheld from Solicitors in the country. To which may be added, that under the Small Debts Court Act, 9th and 10th Vic., c. 95. s. 91., advocacy is not a matter of right, but a privilege depending for its exercise upon the mere pleasure of the Judge.”

So long as the present division of the profession exists, we conceive that pre-audience must be given to the Barrister. It is right, therefore, that if a sufficient number of Barristers attend a Quarter Sessions, they should be heard to the exclusion of Attornies. The clause alluded to in the County Courts' Act, as to professional assistance, has, we apprehend, received so liberal a construction by the new Judges, as to be deprived of all its bad effects.¹

"7. *Certificated Conveyancers.* — The Inns of Court, according to long usage, have allowed their members to practise under the bar as certificated conveyancers ; but such persons formerly confined their practice to the drawing of deeds and other instruments, and advising on questions of title. *Of late years, however, a new class of practitioners has arisen*, assuming not only the office of the Barrister, in advising upon titles and settling drafts, but also claiming to transact business for clients and communicate with Solicitors upon conveyancing matters, in the same way as Solicitors. Now the Legislature, for the protection of the public, having thought it necessary to require that no person should act as an Attorney or Solicitor without serving a clerkship of five years, and undergoing an examination, it is manifestly unjust to the profession and dangerous to the public, that persons not so qualified, and who have not given, and are not required to give, any evidence of their fitness or capacity, should be allowed to practise, and more especially in a branch of the law which requires the greatest skill and experience."

We think there is some little mistake here. The class represented by the present certificated conveyancer is not, we apprehend, a new class of practitioners. It is descended from the scrivener of old, which resembled to some extent the notarial class in France. If there were any authentic history of the profession, this would be rendered clear. The attorney at one time had nothing to do with conveyancing. But we agree so far with the address, that the insisting on the serving a clerkship, and undergoing an examination, in the one case and not in the other, is wrong, and should be remedied.

¹ We have been exceedingly startled by some reports in a provincial paper of what has happened in one of these courts ; of the accuracy of which, however, we must receive some further evidence before we can believe it possible that they are correct statements.

We come now to a grievance to which we have already called attention.

"8. *Parliamentary Agents.* — The vast increase in the private business of the Houses of Parliament has brought forward a great number of persons acting as Parliamentary Agents. Formerly some of the clerks or officers of the two houses, and but few Solicitors, acted in that capacity. At present, however, not only Solicitors, who, from a knowledge of the rules of evidence, the laws of property, and the practice of Parliament, may be fairly supposed qualified, but persons who are qualified by merely signing their names in the Private Bill Office are allowed to act as Parliamentary Agents. This subject has attracted much notice, appears to be pregnant with public inconvenience, and should be brought before the Houses of Parliament with a view to some reform of the present practice."

We have done the like as to the ninth.

"9. *Unjust and unequal Taxation.* — The taxes, in the way of stamp duties, which are levied on Attorneys and Solicitors, have long been a topic of just complaint. The stamps on the articles of clerkship and admission amount to 145*l.*, and the various fees for enrolment, examination, admission, and for commissions to swear affidavits and act as Masters Extraordinary in Chancery, extend the amount to 165*l.* Without entering on the justice or expediency of the stamp duties on articles of clerkship and admissions, the Committee, for the present, advert only to the *annual tax* of 12*l.* on town, and 8*l.* on country Solicitors, for the privilege of exercising their calling, — an imposition which has taken from them ever since the year 1785, when it was first levied, a large annual sum, now exceeding 90,000*l.* Its injustice and inequality are obvious. No tax of this kind is levied upon the clerical or the medical profession in any of their several branches, nor upon the higher grade of the legal profession; nor is it proportioned to the extent of practice, and consequent profits, of the class on which it is exclusively imposed. It is a tax, in fact, that violates not only the principle of equal justice, but the established rules of taxation. The profession is entitled to have this method of raising a revenue extended to every other branch of occupation, or to have it totally repealed."

We agree to every word of this. The tenth, which relates to the present mode of remuneration, is as follows: —

“ 10. *Solicitors' Fees and Emoluments.* — Many attempts have been made within the last few years to abridge the length both of legal proceedings, of deeds, and other instruments. It is admitted, and indeed has been constantly put forward by the proposers of these alterations, that Attorneys and Solicitors were insufficiently remunerated, even while legal instruments remained unaltered. That their remuneration should depend upon the number of words contained in pleadings or conveyances very few would contend. *The substitution of a charge, duly proportioned to the labour and skill employed, and the responsibility incurred, would be a valuable boon to the public and acceptable to the profession.*”

This is an admission of great importance. In our first number¹ we said, “ If a deed could be materially decreased in length by the proposed change, this surely would be in the opinion of all desirable, except on one consideration, that the remuneration for the deed is now measured by its length. But then it would be only fair and reasonable if a great alteration as to length were introduced, that its length should cease to be the basis on which remuneration should be considered in awarding the proper remuneration.” Thus are we brought at length to complete harmony on this point.

The eleventh grievance is the deficient construction and inconvenient situation of the Courts of Westminster. So far as this relates to the deficient construction of Courts, there can be only one opinion; but we have already² expressed our reasons against the removal of the Courts from Westminster, to which we adhere.

We have thought it right to bring these various points before our readers, as taken from a document which we consider an important one. Having them thus clearly stated, we can keep them in view, and we doubt not that before another year be passed, we shall be able to give a good account of some of them. One of the peculiarities of the present state of the public mind is its willingness to hear, and, if possible, to redress any hardship which presses on a class. If it has abolished class-interests, it is also disposed to attend to class-grievances. We agree in the modes of

¹ 1 L. R. 169.

² 3 L. R. 305.

remedy proposed, the extension of law societies, the promotion of fair and honourable practice; the improvement of legal education, the circulation of information, and bringing under the notice of Parliament the general state of the profession.

And what is to be the result of all this? The benefit of the public, and in many cases a change in the tone of public feeling towards the profession. But more than this; a great alteration in the profession itself: if the spirit of investigation is carried by its members into our professional institutions, it is not difficult to foresee the consequences. That this spirit is aroused, this document as well as many other symptoms sufficiently significant, prove. It will be our duty carefully to watch it, endeavouring to moderate it if it rises too high and proceeds too rapidly.

We find also that this address inculcates the general principle, that while great reforms in the law are necessary, they can only be properly or beneficially accomplished by the profession itself; and that it is the duty and interest of the profession to undertake them. They must be made; the public will have them: let them then be effected by those who understand most about them: whoever is ready to assist us in proclaiming these truths, and willing to assist in effecting the good work, we hold as a friend and ally.

PROCEEDINGS OF THE SOCIETY

FOR

PROMOTING THE AMENDMENT OF THE LAW.

THE FOURTH ANNUAL REPORT OF THE COUNCIL.

IN presenting its Fourth Annual Report, the Council have the high satisfaction of congratulating the Society on its continued progress and prosperity. Its income exceeds its expenditure, and more Members have been elected within the last twelve months than in either of the preceding years; nor is this advantage counterbalanced by the death of any distinguished colleague in the great work of Law Amendment.

When the Society looks back at the difficulties attending its original formation, the reluctance of mankind—and especially of professional classes—to fall in with new views; the fears of the timid; the rashness of the sanguine; the apathy of the indolent; the apprehensions of pecuniary interests; the jealousies of official prejudice; and the host of objections which these and other motives raised against its institution, it will find ample reason to rejoice that so much of opposition has been allayed or neutralised; and that so many prophecies of danger have been unfulfilled. If the Society had indeed been composed of rash innovators, *dilettante* legislators, and unpractical declaimers, its final failure would have been assured; it might have commenced in pomp, but it must have ended in insignificance. But *practice, practice, practice*, has been its rule of action; its inquiries have been

directed to subjects of immediate importance, of which the remedies were not so remote as to give to the subject no other than a speculative interest; and while it adopts the often-repeated maxim of advocating the reform of all proved abuses, it takes pains to discover, and to prove them. It is for this latter object that it has so earnestly invited the assistance of non-professional Members; of men, who, unimbued with technical prejudices, can see, and often most acutely feel, the evils of a system, though they may be unable to contrive the practical remedy: *cuique arte sua credendum* applies to the stretching of a shoe, more than to the discovery of where it pinches. Even on technical matters, and among practical men, there is a technical bigotry, which often prevents a man from being the best reformer of his own professional practice. Sir Samuel Romilly was great on the reform of Criminal Law, and the late Mr. Justice Williams, when a Common Law Barrister, was the most formidable assailant of the abuses of the Court of Chancery. When, therefore, we are answered by a non-professional friend, whom we invite to become a member of the Society, that he knows nothing on the subjects of its investigation, we say, in reply, "Come, that we may teach you;" and be assured, that in that process of teaching, we shall become self-instructed. This argument also applies, and with greater force, to those junior members of the profession, whom a laudable diffidence might otherwise deter from joining us. They may doubt their own usefulness, till reminded that the task of drawing up the Reports of Committees will generally devolve upon them, and that in the execution of that task, they will have at once an opportunity of improvement and distinction.

The caution with which our proceedings are conducted is another leading feature in the practice of the Society; there is no acting upon impulses, there are no hurried reports, no hasty resolutions. Giving their Committees every due credit for the great care and continuous diligence with which their inquiries are conducted, the general meetings of the Society do not hesitate to send back for revision any subject which they do not believe to have been fully investigated, on which new objects of investigation appear to have arisen in the

course of discussion, or of which the importance appears to demand a more extensive range of examination. This may give to our proceedings the appearance of slowness. It is at any rate an answer to the imputation of rashness. We do not ask to be judged by the number of our Reports, but by their importance. Neither do we estimate the value of our institution by its direct results alone; its mere existence has its practical advantages; the mere question "why is there such a society?" must induce a beneficial investigation in the mind of the inquirer. Thus it is that from this, and other co-operating causes, the Amendment of the Law is now receiving much more of popular attention, and much sounder views are entertained respecting it, than at any former period. The enormous increase of national wealth, and the corresponding complexities necessarily, not artificially, incident to the multiplication of property, multiplication not in the amount alone, but in the natures and descriptions of such property, will readily account for the public anxiety on this head. Men feel, in their daily dealings, that the institutions of the Plantagenets and the Tudors are as little applicable to the management of a joint-stock company, as their suits of armour would be to the purposes of locomotion. The Courts themselves practically demonstrate their incapacity to deal with unanticipated relations; and the arrears in every one of the higher tribunals prove the necessity for new and increased jurisdictions.

Under these circumstances your Council call upon you in the fullest confidence, to continue your exertions in extending the range of the Society's operations, by recruiting its numbers, and adding to the publicity of its proceedings. You will point with laudable self-satisfaction to the instances in which your labours have already prepared the public, and even the legislative mind, for great and important changes—you will turn to statutes already passed at the suggestion of the Society; and you may be permitted to speculate on the influence which its proceedings, or anticipated proceedings, may have had in hastening other measures, which might otherwise have been indefinitely delayed.

There is no branch in which these effects have been more conspicuous than in that of Real Property and Conveyancing.

Of this the Act for extinguishing Satisfied Terms is a very remarkable example. Its utility has been recognised both in Courts of Law and Equity, and its provisions have been found to be attended with those beneficial results in practice which you anticipated from them. We have high authority for stating that in one property alone several thousands were saved during the first year of its operation.

We noticed in our last Report that a Committee of the House of Lords, composed of Members entertaining great diversity of opinions on most other points, had unanimously required "a thorough revision of the whole subject of conveyancing, and the disuse of the present prolix, expensive, and vexatious system." This has led to the appointment of a Commission to inquire into the measures necessary for carrying the wishes of the Lords into effect; and it is now shown by the most unequivocal signs, that not only the great landed proprietors, and the general body of the public, but a great majority of the profession of the Law, are prepared for the extensive change which such a resolution demands. Concurrently with these demonstrations, during the present year, your Committee on the Law of Property has continued its investigations on the subject, and has presented a Report on the propriety of establishing a General Map of the lands of England and Wales, and on the materials now in existence for making such a map.¹ It has made another report on the practicability of connecting the principle of insurance with titles to land. These Reports have been very amply discussed, both within and without the precincts of the Society. The Council feels itself specially called upon to acknowledge the services of this Committee, which is still continuing its labours on several important subjects referred to its consideration.

During a great portion of the last half century, the state of the Court of Chancery has occupied the attention of statesmen and lawyers; while its delays, expenses, and vexations, have most severely taxed the patience and purses of its suitors. Three new judges, and a numerous staff, have been added to its judicial strength; but the word "Arrear" has not been banished from its vocabulary. Popular opinion has long pointed to the Masters' Office, and the system of

¹ Printed 5 L. R. 385.

references and reports, confirmations and revisions, as the main cause of these obstinate evils. Your Council, therefore, thought it a fit subject to be referred to your Equity Committee, and that Committee has made a Report "on the improvements which may be made in the Masters' Offices."¹ The Report contains many valuable suggestions, and has given rise to a very full discussion of the whole procedure of Courts of Equity. But the subject is very far from being exhausted, and the Council look forward to a series of Reports, and hope for numerous papers, on this most important and most intricate branch of inquiry.

The Committee on Criminal Law has presented a Report on the various plans which have been tried or proposed for the improvement of the treatment of criminals, and on the principles on which punishment ought to be awarded.² This subject was also very fully discussed; and the Society had the advantage of a Draft Report, prepared by Mr. M. D. Hill, which, though it differed in some respects from the Report which was adopted, contained very valuable suggestions. The Council have had the gratification of knowing that in the subsequent discussions on secondary punishments which have taken place in both Houses of Parliament, during the present session, the views contained in the Report of our Criminal Law Committee, which were distinctly brought under the notice of the House of Lords by the noble President of this Society, were very generally recognised and adopted.

Another Report from this Committee, as to whether juvenile offenders might not be advantageously submitted to the jurisdiction of the Petty Sessions, has also been made the subject of legislation. The Bill has passed the Commons, and will probably become law.³

Viewing with great interest the subject of the Administration of Justice in our numerous Colonies, and convinced that the hold which a full and implicit confidence in the law exercises on the affections of a people, long after military or any other force would fail, affords the best security for allegiance to the mother country; and peculiarly attracted

¹ Printed *antè*, 308.

² Printed 5 L. R. 375.

³ It has since passed, and is now 10 & 11 Vict. c. 82. — *Ed.*

to the question by the state of those penal colonies, the difficulties of the due government of which were specially suggested by the preceding inquiries as to criminal punishments, your Council commenced an intended series of references to the Colonial Committee, by an inquiry "as to the law and practice relating to Colonial Judges, in respect to their removal from office." The Committee has presented a Report¹ which has been received with general satisfaction. It demonstrates that the present state of the administration of justice in our vast colonial empire is in many respects unsatisfactory, and requires careful, fearless, and unprejudiced inquiry. That judicial independence, in all jurisdictions, is the first guarantee of good government, is a proposition so universally admitted, that your Council would not pause to comment on it, but for the opportunity of suggesting that slight inconveniences arising from want of subordination are of little moment, and of easy remedy, compared with the danger to be apprehended from any derogation from the judicial character. Your Council trust that this Committee will continue the deliberations which it has so well commenced.

Your Council regret that the Committee on the law of Debtor and Creditor has made no progress; and that the numerous Bills on this intricate subject which have been brought into Parliament during the present session are not destined to produce any immediate advantage to the trading and other classes interested in them.

The progress, however, of a measure of the last session in some degree diminishes that regret. The Council has viewed with great pleasure the establishment of a system of local judicature throughout England and Wales; and, though it may be premature to speak at present of the ultimate operation of that measure, we may be permitted, from all indications, to anticipate great benefit to the community, without any real loss to the profession.

It is indeed with very considerable satisfaction that your Council is able to trace a great abatement in that species of self-interested opposition, which in former times so injuriously impeded the amendment of the Law. With a few exceptions,

lawyers are now taking larger views of professional protection; they find that in most instances the public interest is their own; and in the few cases of exception, or supposed exception, they feel that a class-interest cannot be permitted to stand in the way of social progress. That laws are to be made for the benefit of the people, and not of the lawyers, is now an admitted truth: prolix pleadings and conveyances, useless and multifarious appeals, motions and petitions of course, unattended warrants, unissued writs, fictitious procedure, unearned fees and sinecure offices, have had their day; and though a few yet remain, your Council fully anticipate, that at no distant day, they will be extinguished, (certainly that no new claims to compensation will be created,) and that they will yet see the time, when no judge, officer, advocate or attorney, will look to profit from any source, from which the suitor or client does not derive an adequate and direct advantage.

The time has now arrived when your Council is to surrender into your hands the trust you have reposed in them. Hitherto its members have been annually re-elected, without any change; but it is far from their wish that this should be considered a matter of course; nor would any individual deem himself aggrieved, if another, better qualified in the opinion of the Society, should be substituted in his place. In some instances, the pressure of other avocations has prevented some of the members of the Committee of Management and Chairmen of Committees from giving to the Society all the attention they would have desired.

With every wish for your progress and prosperity, and the fullest determination on the part of those, who may have the honour to be re-elected, to continue their exertions, the Council takes its leave.

21. *Regent Street, June 16. 1847.*

GENERAL MEETING, April 28. 1847. — Mr. COMMISSIONER FONBLANQUE in the Chair.

The Minutes of the last Meeting (the 14th inst.) were read and confirmed. The following Members were balloted for and elected:

John Gilmour, Esq., W. S., of Edinburgh, 7. Quality Court, Chancery Lane; Edward Shepherd Creasy, Esq., Barrister, 2. Mitre Court Buildings, Temple; and Henry Davison, Esq., Barrister, 10. King's Bench Walk, Temple.

The Report of the Committee on the Law of Property on the following reference: "To consider the propriety of making a General Map of the lands of England and Wales, for the purposes of Registration and Conveyance, and otherwise, and to ascertain what steps have been taken, and what materials are forthcoming, for making such a Map," was ordered to be received.

The following reference was made to the Committee on Common Law: "To consider the propriety of reviving the action of account, for the purposes of facilitating the investigation of accounts in Courts of Common Law, particularly in the cases of Partners and Agents."

GENERAL MEETING, May 12. 1847. — Mr. COMMISSIONER FONBLANQUE in the Chair.

The Minutes of the last Meeting (the 28th of April last) were read and confirmed. The following Members were balloted for and elected: The Hon. Charles Pelham Villiers, M.P., 27. Regent Street; Wm. Walker, Esq., Judge of the County Court, Circuit No. 13. Wilsick, Doncaster; and Wm. Stanley Masterman, Esq., Solicitor, Wine Office Court, Fleet Street.

The Report of the Committee on Colonial and Navigation Laws on the following reference was presented: "To consider the Law and Practice as to Colonial Judgeships with respect to the removal of the Judges." It was agreed that the Report should be printed, and further considered at the next Meeting.

GENERAL MEETING, May 26. 1847. — Mr. COMMISSIONER FONBLANQUE in the Chair.

The Minutes of the last Meeting (the 12th inst.) were read and confirmed. John Archibald Campbell, Esq., Sheriff Clerk of Edinburghshire, 2. Albyn Place, Edinburgh, was balloted for and elected.

The Report of the Committee on Colonial and Navigation Laws on the following reference was presented: "To consider the Law and Practice as to Colonial Judgeships with respect to the removal of the Judges," was ordered to be received.

The following Motion was put and negatived: "That the Pub-

lishers of the Law Review be requested to insert copies of all Reports ordered by the Society to be received at the earliest opportunity after they shall have been received."

The following references were made to the Committee on the Law of Property: "To consider the propriety of amending the law of Landlord and Tenant by giving the Tenant a right to compensation for permanent improvements; having regard particularly to the present rule of Law, which prevents an Agricultural Tenant from removing fixtures." "To consider the propriety of making real estate vest in the Executor or Administrator at Law, to be administered by him in Equity, for the benefit of the persons now beneficially entitled to it."

GENERAL MEETING, June 2. 1847. — Mr. COMMISSIONER FONBLANQUE in the Chair.

The Minutes of the last Meeting (the 28th of May last) were read and confirmed. A Paper directed by the Committee on Equity to be read to the Society on the following reference was presented: "That the Committee be requested to direct their valuable labours to the consideration of whether any further alterations can be made in the whole system of the jurisdiction, practice, and constitution of the Masters and Masters' Offices, with a view to obtain a more speedy and cheap administration of justice in the Court of Chancery." It was agreed that the Paper should be printed and further considered at a Special Meeting, to be held on Wednesday the 16th, at Eight o'Clock in the Evening.

ANNUAL MEETING, June 16. 1847. — The RIGHT HON. LORD BROUGHAM in the Chair.

The Report of the Council as to the state and progress of the Society was received, and ordered to be printed and circulated among the Members. The Accounts of the Committee of Management were presented and approved of. The following officers were balloted for and elected for the ensuing year:

President — Lord Brougham.

Vice-Presidents — The Lord Chancellor; The Duke of Richmond, K. G.; The Duke of Cleveland, K. G.; The Earl of Devon; The Earl of Radnor; Lord Ashburton; Lord Campbell; Rt. Hon. Stephen Lushington, LL.D.

Committee of Management — William Ewart, Esq., M.P.; Mr.

Commissioner Fonblanque ; Mr. Commissioner Fane ; Edward Vansittart Neale, Esq. ; J. Pitt Taylor, Esq.

Treasurer — James Stewart, Esq.

Hon. Secretary — William Vizard, Esq.

A Letter having been read from Mr. Spence, Q. C., expressing his regret that his other avocations prevented his giving due attendance as a Member of the Council, and that he was desirous of retiring, his resignation was accepted ; and it was moved and seconded, That the best thanks of the Society are due, and are hereby respectfully tendered, to George Spence, Esq., Q. C., for the valuable assistance which he has rendered to the Society.

SPECIAL GENERAL MEETING, June 16. 1847.—**MR. COMMISSIONER FONBLANQUE** in the Chair.

The Minutes of the last Meeting (the 2d inst.) were read and confirmed. The following Members were balloted for and elected : Thomas Alexander Mitchell, Esq., M. P., 6. B, Albany ; H. W. Freeland, Esq., Barrister, 19. Duke Street, St. James's ; Stafford Henry Northcote, Esq., 13. Devonshire Street, Portland Place ; Edward Webster, Esq., Barrister, 9. Old Square, Lincoln's Inn ; John Smith, Esq., Barrister, 11. King's Bench Walk, Temple ; Charles Barron Courtenay, Esq., Solicitor, Leeds ; and William Turquand, Esq., Official Assignee, 13. Old Jewry.

The Paper directed to be read to the Society by the Committee on Equity relating to the Masters' Offices was further considered. It was agreed that the Paper should be taken into further consideration at the next Meeting.

GENERAL MEETING, June 30. 1847.—**MR. COMMISSIONER FONBLANQUE** in the Chair.

The Minutes of the last Meeting (the 16th inst.) were read and confirmed. The following Members were balloted for and elected : Frederick Charles Gausen, Esq., Barrister, 2. Harcourt Buildings, Temple ; Robert P. Collier, Esq., Barrister, 4. Harcourt Buildings, Temple ; Andrew Caldecott, Esq., as representing the firm of Caldecott, Powell and Co., Warehousemen, 20. Cheapside.

The Paper directed to be read to the Society by the Committee on Equity relating to the Masters' Offices was further considered, and another paper directed to be read to the Society by the same Committee relating to the same subject was presented.

It was agreed that the last mentioned Paper should be printed,

and that both Papers should be referred to the Committee, with instructions to consider the same, and to make a Report to the Society upon the reference heretofore made to the Committee respecting the practice in the Masters' Office, and the best mode of improving it.

GENERAL MEETING, July 14. 1847. — Mr. COMMISSIONER FONBLANQUE in the Chair.

The Minutes of the last Meeting (the 30th of June last) were read and confirmed. The following Members were balloted for and elected: The Right Hon. Edward Ellice, M. P., 13. Great Cumberland Street, Hyde Park; John Reddie, Esq., Chief Justice of St. Lucia; Robert Gordon, Esq., 32. Hill Street, Berkeley Square; C. F. Humbert, Esq., Watford; Joseph Livesey, Esq., 42. Sackville Street, Piccadilly.

The following Motions were put and negatived: "That in the 16th of the rules and regulations of the Society the words, 'The Council may direct that any Reports of Committees or other papers shall be printed as the Transactions of the Society, or for the purpose of discussion or otherwise,' be substituted for the words, 'The Council shall determine what Reports of Committees or other papers, shall be printed as the Transactions of the Society or otherwise.'" "That in the 19th of the same Rules and Regulations the following words be introduced immediately after the words "Summons to each member." "Any Committee may lay before the Society any paper or papers to which not less than three Members shall assent upon the subject referred to them, either together, with or in lieu of a Report thereon."

A Paper directed to be read to the Society on the following reference was presented: "To consider the propriety of reviving the action of account, for the purpose of facilitating the investigation of accounts in Courts of Common Law, particularly in the cases of Partners and Agents."

It was agreed that the Paper should be printed and referred to the Committee on Common Law, to consider and report thereon.

Adjourned till Wednesday, the 28th inst., at Eight o'Clock in the evening precisely.

AT a PUBLIC MEETING held at the Rooms of this Society on Saturday the 5th of June, 1847, LORD BROUGHAM in the Chair,

1. It was proposed by the Earl of Devon, seconded by the Earl of Radnor, and carried unanimously, "That this meeting fully

appreciates the advantages likely to arise from an unprejudiced and continued investigation of the defects in our laws and legal institutions, and of the best means of remedying them."

2. It was proposed by Viscount Ebrington, M. P., seconded by Mr. James Stewart, and carried unanimously, "That the expense and delay inseparable from the present method of inquiring into the title to land, and the present forms of conveyance, impede the transfer of landed property, greatly depreciate its value, and operate as a social evil. This meeting has therefore observed with pleasure that her Majesty's Government has appointed commissioners to inquire into the subject, which it hopes will receive the searching and unbiassed investigation its importance demands."

3. It was proposed by Mr. Hume, M. P., seconded by Mr. Ewart, M. P., and carried unanimously, "That this Meeting has seen with pleasure the recent attempts to improve the mode of conducting the private and local business of Parliament, and that this Meeting trusts that they will be persevered in until a complete remedy for the evils so long complained of be obtained."

4. It was proposed by Lord Ashburton, seconded by Mr. Wm. Hawes, and carried unanimously, "That the representations of the bankers, merchants, and traders of the city of London on the operation of the recent laws respecting imprisonment for debt are deserving of respectful attention; and without pronouncing any opinion thereupon, it is manifest that as the experience of the working of these important alterations in our system may have shown defects and suggested remedies, there can be no reason against taking the whole matter into further consideration, with the benefit of that experience."

5. It was proposed by the Duke of Richmond, K. G., seconded by Mr. Serjeant D'Oyly, and carried unanimously, "That the labours of the Committee appointed by the House of Lords to inquire into the criminal law have been of great public benefit, more especially in directing attention to the question whether the principal object of the law should not be the reformation of the criminal, and not be confined to the deterring from crime."

6. It was proposed by Mr. Bethell, Q. C., seconded by Mr. Commissioner Fane, and carried unanimously, "That this Meeting declares its entire adoption of the following sentiments which Lord Lyndhurst, when Lord Chancellor, is reported to have addressed to the House of Lords: 'As far as the great charities are

concerned, the Court of Chancery is a tribunal without exception in some respects ; but even in regard to these it is impossible not to feel that *enormous* expenses are incurred ; in the case of charities of moderate amount *ruinous* expenses are incurred ; but with respect to the smaller charities the doors of the Court are absolutely closed against them :’ and this Meeting expresses its earnest hope that this subject will receive the early attention of the Legislature.”

SELECTION OF ADJUDGED POINTS

REPORTED SINCE 1ST MAY, 1847.

POINTS IN COMMON LAW, p. 417.

POINTS IN EQUITY, p. 430.

POINTS IN THE LAW OF PROPERTY, p. 441.

POINTS IN BANKRUPTCY, 442.

COURTS.	REPORTERS.
Lord Chancellor - - -	1 Phillips. Part 5.
	1 Coop. t. Cott. Part 2.
L. C. of Ireland - - -	2 Jones and Latouche. Parts 2 & 3.
Rolls Court - - -	9 Beavan. Part 1.
V. C. of England - - -	14 Simons. Part 4.
V. C. Wigram - - -	5 Hare. Part 3.
Queen's Bench - - -	7 Q. B. Rep. Parts 2 & 3.
Common Pleas - - -	2 C. B. Rep. Part 5.
Exchequer - - -	16 Mees. and W. Part 1.
Nisi Prius - - -	2 Carrington and Kirwan. Part 2.
Practice Cases - - -	4 Dowl. and Lowndes. Part 2.
Bankruptcy - - -	1 De Gex. Part 2.

I. POINTS IN COMMON LAW.

1. Imprisonment — Partial Restraint. 2. Scrip — Stamp Act — Goods, Wares, and Merchandise. 3. Railway Company — Allotment of Shares — Recovery of Deposit. 4. Church Rate — Votes — Public Meeting. 5, 6. Judgment — Charging Order — Pension — Interest on Judgment. 7, 8. Evidence — Lord Denman's Act — Foreign Law. 9, 10. Practice — Judge's Notes — Undertaking to give material Evidence. 11, 12. Pleading — Slander — Case for Damage to Reversion. 13. Suit in formâ pauperis — Release — Attorney's Lien.

1. BIRD V. JONES. 7 Q. B. 742.

Definition of Imprisonment — Partial Restraint.

In this case a question arose regarding the liberty of the subject, and upon such an occasion it is to be lamented that a want

of unanimity appears to have existed among the learned judges of the Court of Queen's Bench. The substantial question was, whether a partial restraint of the person in a public highway amounted to an imprisonment in law so as to sustain an action of trespass for assault and false imprisonment, or merely to an obstruction of the right of passage, for which an action on the case might be brought.

A part of Hammersmith bridge, which is a public highway over the Thames, had been enclosed by a temporary fence, and appropriated for the accommodation of the spectators of a boat race which was to take place on the river. The plaintiff insisted upon passing along the part so appropriated, and attempted to climb over the fence, but was opposed by the defendant (the clerk of the bridge company), who pulled him back ; but after a struggle the plaintiff succeeded in climbing over the fence. Two policemen were then stationed by the defendant to prevent, and did prevent the plaintiff from passing onwards in the direction that he wished to go ; but he was allowed to remain unmolested where he was, and was at the same time told he might go in the other direction if he pleased. This he refused to do, and remained where he had placed himself for half an hour. Upon these facts the puisne judges of the court held that there had been no imprisonment, because the restraint had only been partial, and that an action of trespass for assault and false imprisonment did not lie. Patterson, J. : " I have no doubt that in general, if one man compels another to stay in any given place against his will, he imprisons the other just as much as if he locked him up in a room ; and I agree that it is not necessary, in order to constitute an imprisonment, that a man's person should be touched. I agree also that the compelling a man to go in a given direction against his will may amount to imprisonment. But I cannot bring my mind to the conclusion that if one man merely obstructs the passage of another in a particular direction, whether by threat of personal violence or otherwise, leaving him at liberty to stay where he is or to go in any other direction if he pleases, he can be said thereby to imprison him. He does him wrong undoubtedly, if there was a right to pass in that direction, and would be liable to an action on the case for obstructing the passage, or of assault, if, on the plaintiff persisting in going in that direction he touched his person, or so threatened him as to amount to an assault. But imprisonment is, as I apprehend, a total restraint of the liberty of the person for however short a time, and not a partial obstruction of his will,

whatever inconvenience it may bring upon him. The quality of the act cannot, however, depend upon the right of the opposite party. If it be an imprisonment to prevent a man passing along the public highway, it must be equally so to prevent him passing further along a field into which he has broken by a clear act of trespass." From this opinion Lord Denman strenuously differed; and as the case involves an important public principle, it is desirable to furnish an extract from his lordship's judgment upon this occasion. Lord Denman, C. J.: "There is some difficulty, perhaps, in defining imprisonment in the abstract without reference to its illegality, nor is it necessary for me to do so, because I consider these acts (of the defendant) as amounting to imprisonment. That word I understand to mean any restraint of the person by force. . . . I had no idea that any person in these times supposed any particular boundary to be necessary to constitute imprisonment, or that the restraint of a man's person from doing what he desires ceases to be an imprisonment because he may find some means of escape. It is said that the party here was at liberty to go in another direction. I am not sure that in fact he was, because the same unlawful power which prevented him from taking one course might, in case of acquiescence, have refused him any other. But this liberty to do something else does not appear to me to affect the question of imprisonment. As long as I am prevented from doing what I have a right to do, of what importance is it that I am permitted to do something else? How does the imposition of an unlawful condition show that I am not restrained? If I am locked in a room, am I not imprisoned, because I might effect my escape through a window, or because I might find an exit dangerous or inconvenient to myself, as by wading through water, or by taking a route so circuitous that my necessary affairs would suffer by delay? It appears to me, that this is a total deprivation of liberty with reference to the purpose for which he lawfully wished to employ his liberty; and, being effected by force, it is not the mere obstruction of a way, but a restraint of the person."

2. KNIGHT V. BARBER, 16 Mees. & W. 66.

Scrip — Stamp Act — Goods, Wares, and Merchandise.

The question in this case was, whether railway scrip certificates are merchandise within the meaning of that word in the Stamp Act, which exempts from duty any "agreement made for or re-

lating to the sale of any goods, wares, or merchandise." The action was brought by a broker to recover the price of some scrip sold by him to the defendant. The cause was tried at the Liverpool Assizes, and it was proved that on the 12th August, 1845, the defendant gave the plaintiff a verbal order for fifty shares in a particular company. The witness stated also that on the afternoon of the same day the defendant signed the following memorandum, which was handed to the plaintiff: "Bought of N. Knight (the plaintiff) 50 shares in the Huddersfield, &c. Co. at 10*l.* per share." The memorandum was lost, but the witness gave the contents from memory, and said it was unstamped. Thereupon Mr. Justice Cresswell ruled that the memorandum ought to have been stamped, and nonsuited the plaintiff. A motion for a new trial having been made on the ground that there had been a complete contract by words irrespective of the written memorandum, and that the scrip certificates were "merchandise" within the meaning of the exemption in the Stamp Act, the Court refused the rule. Pollock, C. B.: "Where parties are making an agreement by parol, and subsequently reduce it into writing, the writing constitutes the contract. Where they discuss a question in the morning, and in the afternoon put down the result in writing, the inference is that they mean to abide by what they have written. . . . This therefore was a contract of sale by the defendant, binding him as an agreement, which required a stamp. The next question is, whether the sale of railway scrip is a sale of goods, wares, or merchandise. I think it is not; the sale of scrip is nothing more than an agreement for the transfer of the interest which the party may thereafter possess in the capital of the company, and that interest does not come within the description of goods, wares, or merchandise." Parke, B.: "Scrip in a railway company is a mere equity, a mere right to something, which may thereafter exist. It is sold, it is true, among speculating persons, but not as an article of general commerce. The sale of it is merely the assignment of a bargain."

3. WONTNER v. SHAIRP, 2 Carr. & K. 273.

Railway Company — Allotment of Shares — Recovery of Deposits.

The Direct London and Exeter Railway was formed in May, 1845, and provisionally registered. Its object was the formation of a line of railway from London to Exeter, with an extension to Falmouth and Penzance, and the capital was described in the

prospectus as 3,000,000*l.* in 120,000 shares of 25*l.* each, deposit 1*l.* 7*s.* 6*d.* a share. On the application of the plaintiff sixty shares were allotted to him on the 15th October, by the allotment committee, whereof defendant was chairman. On the 17th October an advertisement, signed by the secretary of the company, notified that the allotment of shares was complete on the 21st October: the plaintiff paid 82*l.* 10*s.* to the company's bankers as the amount of deposits on the shares allotted to him. In a few weeks it transpired that only 58,000 shares had been allotted instead of 120,000, which was to have constituted the capital of the company; the committee having retained the rest for their own disposal. The scheme afterwards fell to the ground, and the plaintiff brought his action to recover his deposits on the shares allotted to him.

It was objected at the trial that the plaintiff had got all he bargained for, and that there was no stipulation that the contract should be void if the whole number of shares were not issued: Erle, J.: "The case must go to the jury. The contract was, that the plaintiff should have allotted to him sixty shares, parcel of 120,000 shares, which were estimated to produce a capital of 3,000,000*l.*, to be employed in the construction of a railway, that would, as was estimated, cost as much. That does not mean that he should have a portion of 58,000 shares, and run the risk of the remainder being allotted, to make the completion of the undertaking practicable. I think it material for him to know the number of his fellow-shareholders, and how much of the necessary capital was subscribed. I must leave it to the jury to say, whether the representation was made to him that there should be 120,000 shares. There is evidence to show that the contract is tainted with fraud. On the second ground the plaintiff cannot recover unless the scheme is abortive. If it is so, it has already been decided that parties are entitled to recover back their deposit money. It would be rather strong to say that this has been made out; but there is evidence enough for me to leave it to the jury to say whether the defendant has not rendered it virtually impossible to go on with the plan. No doubt, if the parties agree to go on with one half of the number of the shares proposed, they may; but then any individual who pleases may withdraw, for it would really be a new contract."

4. GOSLING v. VELEY, 7 Q. B. 406.

Church Rate — Votes — Public Meeting.

In this country, where so much business is transacted in local assemblies convened for the exercise of corporate or other fran-

chises, or for the discussion of political measures, every decision of the superior courts relative to the fundamental principles of law, by which such assemblies ought to be regulated, is of great national importance irrespective of the peculiar subject which gave rise to the litigation. The present case arose out of the long pending controversy regarding the Braintree church rates. A monition had issued from the ecclesiastical court, requiring the parishioners to make a rate for the repair of the church. A vestry was duly summoned for the purpose. The chairman proposed a rate: an amendment was moved to the effect that all church rates were oppressive and improper, and was carried by a majority upon a show of hands: the churchwardens then proposed that the minority who were willing to vote for the rate should obey the monition, and the rate proposed was accordingly signed by the vicar, churchwardens, and several rate payers present, the original motion for a rate not having been again put from the chair after the amendment was carried. Upon these facts the question arose, whether the minority who made the rate ought not to be considered in law the majority; and the decision of this point depended upon the further question whether or not it was the duty of the meeting to vote for some rate, even if they disapproved of the rate specifically proposed. The Court of Q. B. being clear as to the obligation to make a rate, the effect of the votes given by the numerical majority and minority respectively was considered, and was dealt with by the Court, upon the same footing as in cases of parliamentary or corporate elections. Lord Denman, C. J.: "Where an elector before voting receives due notice that a particular candidate is disqualified, and yet will do nothing but tender his vote for him, he must be taken voluntarily to abstain from exercising his franchise; and therefore, however strongly he may in fact dissent, and in however strong terms he may disclose his dissent, he must be taken in law to assent to the election of the opposing and qualified candidate; for he will not take the only course by which it can be resisted, that is, the helping to the election of some other person. He is present as an elector; his presence counts as such to make up the requisite number of electors, where a certain number is necessary; but he attends only as an elector to perform the duty which is cast on him by the franchise he enjoys as an elector; he can speak only in a particular language; he can do only certain acts: any other language means nothing; any other act is merely null; his duty is to assist in making an election. If he dissents from the choice of A, who is qualified, he must say so by voting for some other

also qualified; he has no right to employ his franchise merely in preventing an election, and so defeating the object for which he is empowered and bound to attend. If then the elector will not oppose the election of A in the only legal way, he throws away his vote by directing it where it has no legal force; and in so doing, he voluntarily leaves unopposed, *i. e.* assents to, the voices of the other electors. . . . This was a case in which the parishioners were required to provide a fund both for repairs and the decent celebration of divine service in the church: a money rate was the only mode of providing for the latter: it was a lawful and reasonable mode of providing for the former; it was proposed, and its amount unquestioned. If, then, any other mode could have been suggested, it lay upon those to propose it who objected to that which was in due form proposed; that which was at least reasonable and lawful in itself, which was at least one way in which the duty of the vestry might be performed, could be displaced, not by merely protesting against it, but only by the substitution of some other, equally legal and effectual. But this was not attempted. The result of the whole is this: the vestry was lawfully assembled to consider of the repairs of the church, and the providing things necessary for the due and decent celebration of divine service therein; the members present agreed that repairs were required, and that there was a want of such necessaries; they agreed that the estimates submitted by the churchwardens were reasonable, the amount proposed proper; whereupon it became the duty of the vestry to make provision of some sort: a rate was duly proposed; no amendment was moved, no modification suggested, no other rate put forward; but the majority, in the strongest terms, protested against it and against all compulsory rates. The minority disregarded this protest, and made the rate first proposed. This seems to us a case in which the rule as to corporate and other elections is properly applicable; the principle on which it is founded directly governs it. Under the circumstances, there remained only a certain thing to be done by the meeting: the parishioners were assembled under competent authority for the doing it; they came clothed with a limited character, charged by the law with a certain duty: whatever any of them, however numerous, in proportion to the remainder, said or did foreign from the purpose, or going beyond the character, or in contravention of the duty, reckons for nothing; it is not to be counted against the acts of those who seek to discharge their duty: it is the speech or act of the individuals, not of the vestrymen. As is

said in one of the cases, it is the same as if they had been silent, and, being present, but silent, exactly as if they had been absent. They must be taken to assent to what the other vestrymen agree to, as such, in the carrying out of the purpose of the meeting. Nor needed there any notice to be given which was not given. No fact was unknown to the majority, the knowledge of which might have altered their votes. The law under which they were assembled, which determined their duty, and the purpose of their meeting, they must be presumed to have known; and it is satisfactory to feel sure that they did know it. The recency, and the great notoriety of the judgment in *Veley v. Burder*¹, and the very language of their protest, put this beyond a doubt. Neither can it be said that this is to apply a rule of law, limited to one subject matter, to another and distinct class of cases. For it is not so, properly to be considered, as a rule of corporation, as it is one for the ordering of all meetings assembled to deliberate and vote on the performance of a definite duty. Whenever the proceedings at such meetings have come in question before the Courts of Common Law (and there have been many such, vestry meetings, meetings of turnpike trustees, parish meetings for the election of parochial officers), the same general rules have been applied as grounds for deciding on their validity. The chairman or president has always been considered as charged to exclude irrelevant motions, and to admit voting only upon such as are within the purpose and competency of the meeting. The principle, indeed, may be best illustrated by the analogy drawn from electoral meetings; but it is in truth of a very general nature, and inseparable from the proceedings of any assembly convened for doing some act necessary to be done at that meeting. The majority must do it; otherwise, however necessary, it will be left undone. But what majority? The majority of those who choose to take a part in the proceedings of the assembly. At almost every meeting of commissioners for executing public works, and imposing rates for the purpose, it is probable that the resolution is formed by a small number of those who attend, on whom the larger number are content to rely. If it were found as a fact that five had passed the resolution in a room containing twenty, of whose proceedings the other fifteen were ignorant, this would be the undoubted act of the whole meeting, if the proceedings had been conducted regularly, and no fraud was practised to occasion the ignorance of the fifteen. But suppose the twenty were convened to do an act which the law required them to do at the time, and the only open

¹ 12 A. & E. 265.

question was as to the *mode* of doing it; a mode lawful in itself is regularly submitted, whereupon fifteen declare that, though the law has imposed the duty on them, they entertain so strong an objection, on the grounds of conscience, to the law, that they refuse entirely to concur in obeying it. What must be the consequence? Must the law be set at nought and its requirements be disregarded, or must not those who stand aloof be considered as refusing to assist in the execution of their duty, and leaving it to be done by the minority, which is desirous of doing what is right? In the case now before us, it was the duty of the chairman to have refused to take the sense of the vestry on that which was called an amendment. But his allowing the question to be put cannot enlarge the powers of the vestry, nor prevent the opposing party from voting on such matters duly proposed as were within the purpose for which they were assembled. If the punishment of interdict for refusing to make a rate were now available, might not a minority prevent the infliction of so heavy a sentence by acting as they have done here, or could they be stopped because the chairman had suffered a vote to be taken on an insensible and irrelevant motion?"

5. MORRIS V. MANESTY, 7 Q. B. 674.

Judgment — Charge under Judge's Order — Pension.

The plaintiff had recovered judgment in this action, and then obtained a judge's order under the stat. 1 & 2 Vict. c. 110., for abolishing arrest, &c., to charge an annuity of 100*l.* a year, standing in the defendant's name in the books of the East India Company, with the payment of the debt and costs. On the motion of a party to whom the defendant had assigned this pension the Court set aside the charging order, on the ground that the pension was payable solely under certain resolutions of the East India Company, and that, in fact, there were not any stocks, funds, &c. standing in the defendant's name, or in the name of any trustee for him, in respect of the annuity, so as to satisfy the words of the statute. He had, in truth, *no property* in the pension, which was the voluntary bounty of the East India Company.

6. NEWTON V. GRAND JUNCTION RAILWAY COMPANY, 16 Mees. & W. 139.

Judgment — Interest.

In this case the Court of Exchequer decided that, under the stat. 1 & 2 Vict. c. 110. s. 17., which enacts that every judgment shall

carry interest at the rate of four per cent. per annum, "from the time of entering up the judgment," interest is to be computed from the incipitur or first entry of the judgment at the Exchequer of Pleas Office, and not merely from the final completion of the judgment after the taxation of costs. Pollock, C. B. : "All the Court are of opinion that interest is to be calculated from the time of the entry of the incipitur. The giving of interest is not by way of a penalty, but is merely doing the plaintiff full justice, by having his debt with all the advantages properly belonging to it. It is, in truth, a compensation for delay. If loss accrues from that, it should rather fall on the defendants, who are in the wrong, than on the plaintiff."

7. *HILL v. KITCHING*, 2 Carr. & K. 278.

Evidence — Lord Denman's Act.

The plaintiff was a ship-broker, and had procured the defendant's ship to be chartered to Ichaboe for a cargo of guano at certain commission, payable to the plaintiff on the freight. To recover this commission the action was brought. The attesting witness to the charter-party had introduced the plaintiff to the defendant, and for so doing was entitled, by the custom of trade, to receive a moiety of the commission, half of which he had originally charged to the defendant, who struck it out of the account. He admitted these facts on the *voir-dire*. Under these circumstances, it was contended at the trial that, as the witness had attempted unsuccessfully to charge the defendant, and acknowledged that he did not expect to receive anything unless the plaintiff succeeded, he had an immediate and individual interest in the suit; and that the plaintiff was, in fact, a trustee for him to the extent of one moiety of what might be recovered in the action; so that the witness was disqualified under the excepting clause of Lord Denman's act, 6 & 7 Vict. c. 85.

Tindal, C. J. : "There is no contract, in my opinion, between the witness and the defendant. His claim is solely against the plaintiff. He is in a position analogous to that of a man who has laid a wager on the result of an action: it is a circumstance that merely goes to his credit. The words of the proviso in Lord Denman's act applicable to this case are, that the act 'shall not render competent any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part.' Now this action cannot be said to be brought in behalf of this witness, as he will derive no benefit from a judgment in favour of

the plaintiff: his only resource will be to bring an action on his own implied contract. I think, therefore, his evidence is admissible."

8. COCKS v. PURDAY, 2 Carr. & K. 269.

Evidence — Foreign Law of Copyright.

A witness skilled in the laws of Bohemia was put into the box to prove the laws of that country respecting copyright. It was objected, that if he was going to speak of written laws, they should be put in and read. Erle, J.: "The proper course to ascertain the law of a foreign country is to call a witness expert in it, and ask him, on his responsibility what that law is, and not to read any fragment of a code which would only mislead." objection overruled.

9. PARKHURST v. GOSDEN, 2 C. B. 894.

Practice — Judge's Notes.

A motion was made for a rule calling upon the judge of the Sheriff's Court of London to show cause why he should not furnish the defendant with a copy of the notes taken by him (the judge) upon a trial between the parties to the present action in the year 1842, upon an affidavit that the notes were material to the defence of the present action, to enable counsel to cross-examine the plaintiff's witnesses. Tindal, C. J.: "How can we grant a rule against the judge of the Sheriff's Court? I do not know that he is bound to take a note at all. The defendant should have taken care to have some person present at the former trial capable of taking a note of what occurred. Judges' notes are not to be made instruments of attack or defence in the hands of either party." Rule refused.

10. HALL v. STORY, 4 Dowl. & Lowndes, 345.

Practice — Undertaking to give material Evidence.

The plaintiff in this case was bound by an undertaking to give material evidence in the county of Durham, where the cause was tried. The action was brought to recover the price of some provisions supplied to the defendant and others on his account; and at the trial, in order to satisfy his undertaking, he gave in evidence a letter written by the defendant, and posted at St.

Helen's, Auckland, in the county of Durham, and received by the plaintiff at Thirsk, in Yorkshire. A question was made whether this letter was material evidence in the county of Durham, and the point was reserved by the learned judge who tried the cause. The plaintiff had a verdict. The defendant then moved to enter a nonsuit. Pollock, C. B.: "There is a case of *Gilling v. Dugan* (1 C. B. 8.), where the defendant bought goods of A, at Southampton, which were sent to him at Southsea, in Hampshire, two months afterwards; and the plaintiff (for whom A as agent had made the contract) sent the defendant a duplicate invoice inclosed in a letter posted in *Middlesex*. In reply, the defendant disclaimed all knowledge of the plaintiff, but admitted the contract with A, and expressed his willingness to pay the plaintiff, provided A authorised him to do so; and it was held that these letters, an agency being proved, were sufficient to satisfy the plaintiff's undertaking to give material evidence in *Middlesex*. So here the defendant posts his admission of the defendant in Durham. There ought to be no rule."

11. CHANTLER & WIFE V. LINDSAY & WIFE, 4 Dowl. & L. 339.

Pleading — Slander.

The plaintiffs brought an action on the case for slander spoken by the defendants of the female plaintiff. The defendants pleaded that the plaintiff, Maria, was not the wife of the plaintiff, George, *modo et formâ*. To this plea the plaintiffs specially demurred on the ground, that the matter of the plea was, if true, matter in abatement and not in bar of the action. Pollock, C. B.: "The question is, whether, in an action by husband and wife, the present plea is a good plea in bar, or whether it ought to be a plea in abatement. We think it is a good bar, as it shows that the person who sues as husband has no right to sue at all. Our judgment will, therefore, be for the defendants."

12. TAYLOR V. STENDALL, 7 Q. B. 634.

Pleading — Case for Damage to Reversion.

This was an action for prostrating part of the wall of a house in which the plaintiff had the reversion, and for building on part of the same wall, and for laying building materials on a close of which plaintiff was also the reversioner. The defendant pleaded that his own house, which he was repairing, accidentally fell down without his default, and in its fall knocked down the plaintiff's wall, and

that within a reasonable time, and before action brought, repaired the plaintiff's wall, at his own expense, in the close in question, and so unavoidably committed the grievances complained of. To this plea the plaintiff demurred; and, after argument, the demurrer was allowed, on the ground that though it might be the right and duty of a tenant to repair waste, a stranger has not at common law any right to enter for that purpose. Coleridge, J.: "You say that you have a right to enter and repair, whether the owner of the premises be willing or not. Your plea admits that you were bound to do something; you say you repaired; but had you a right to commit a trespass in order to repair? The question is, whether such an act can be a defence." Lord Denman, C. J.: "There is a vested right of action: the plea states a kind of set-off; but that is no answer. The tenant, in case of waste, is bound to do the repairs." Judgment for plaintiff.

13. WRIGHT v. BURROUGHS, 4 Dowl. & L. 226.

Suit in formâ Pauperis — Release — Attorney's Lien.

The plaintiff sued in *formâ pauperis*, and the pleadings had gone as far as a rejoinder, when the plaintiff released the action, and the defendant delivered a plea of release *puis darrein continuance*. A motion was then made to set aside the plea, on the ground that the release was executed in fraud of the attorney's lien. Maule, J.: "The attorney, where the plaintiff sues in *formâ pauperis*, is directed by the Court to act on the pauper's behalf, and, as an inducement, he is promised to be paid in case he succeeds. But the plaintiff, by extending this release, takes away all chance of the payment of costs, because he (the attorney) cannot obtain any from his own client." Tindal, C. J.: "The costs are part of the *spes spoli* for which the attorney labours. I do not mean to say that no case can occur in which a pauper plaintiff may settle an action; but it must be a strong case to justify us in upholding a release executed by a person in such a situation, when the Court has appointed an attorney to act on his behalf. The attorney expends his money and labour in the expectation and hope that the result will repay him. A release destroys such hopes; and if we were to permit a release to be pleaded in cases like the present, we should ultimately find that no attorney would be disposed to act." Rule absolute to set aside the plea.

II. POINTS IN EQUITY.

1. Grammar School — Exhibitions — Public Policy. 2, 3, 4. Legacy — Charity — Poor — Payment. 5, 6. Executor — Breach of Trust — Costs. 7, 8, 9. Practice — Appointment of new Trustees — Injunction — Copyright — Decree — Administration Suit.

1. ATTORNEY-GENERAL V. EARL OF STAMFORD, Phill. 737.

Grammar School — Exhibitions — Public Policy.

It is well known that many public schools, frequented by the sons of the higher classes of society, were founded as Free Grammar Schools, for the benefit of the common people of the locality. To these schools various scholarships and exhibitions at the Universities have been from time to time attached; and the masters have also been permitted to take boarders, who pay a higher rate of remuneration for their scholastic training, and are also allowed to compete for the scholarships and exhibitions. This course has been sanctioned by the Court of Chancery, after great discussion, in the cases of Harrow and Rugby schools. (17 Ves. 505.) But Lord Cottenham appears to think, in the case before us, that the practice is erroneous, and ought not to be extended; and he therefore disallowed the continuance of the privilege in the present suit, which had been instituted for the better administration of the Free Grammar School of Manchester. The parties, however, were not satisfied with his Lordship's views on this question, and brought the matter again before Lord Lyndhurst on a rehearing; and as any remarks falling from so able a judge and statesman are worthy of attention upon a point of so much public interest, the following extract is taken from his Lordship's judgment on this point of the case. Lord Lyndhurst C.: "The remaining, and certainly, as Lord Cottenham stated, the most important consideration with reference to the welfare of the school, is that which relates to the boarders. The practice of taking boarders is allowed, after some hesitation, by this Court. Neither party quarrels with that part of the decree, and therefore I am not called upon to inquire into it; but there is this restriction imposed, and it appears to me to be a most important one, and requiring very serious attention and much caution—that the boys who are received into the houses of the masters as boarders are not to be allowed to share in the exhibitions and premiums with the other scholars. Now the first thing that strikes me is this, that one very great object in sending boys from a distance to be educated in this school, and to become

boarders with the masters, must be the advantage of those exhibitions at the Universities; and I cannot help thinking that it is — I will not say altogether, but almost — nugatory to allow the masters the privilege of taking boarders, and to refuse to those boarders the privilege of sharing in the exhibitions. I think it would defeat the very object of taking boarders, and that it was almost useless to allow that practice to be continued if this restriction is to be acted on. . . . As the school, therefore, was, by the deed of foundation, open to boys from all countries, and who would, of course, be entitled, as members of the school, to share in the exhibitions, I do not perceive how a payment to the master, under the sanction of the Court, can justly deprive them of their right. . . . I cannot help coming to the conclusion, that the boarders are objects of the charity, and therefore entitled to share in the exhibitions and premiums. . . . If I thought, on looking at the evidence, that this led to any abuse; if there was anything to satisfy me that the boarders in the houses of the masters were considered with any peculiar favour in the elections for these exhibitions and premiums, I should then consider it the duty of the Court to interpose. But from the manner in which the elections are conducted, and, adverting to the evidence, with one single exception, to which I shall presently direct my attention, there does not appear to me to be any ground for suspecting, that in the choice that is made from the whole body of scholars who are candidates for these exhibitions, any partiality is shown towards those who are boarders in the houses of the masters. It is true, that, if you look to the number of boys who have received exhibitions, the proportion of boarders is much larger than of day scholars; and it is inferred, from that circumstance, that some abuse exists in the selection. But it appears to me, that that observation is altogether inconclusive, for many reasons. Undoubtedly the proportion is much larger, and any body who reflected upon it beforehand would be satisfied that it must be so, for reasons which are quite obvious. In the first place, boys coming from a distance would, in all probability, be better prepared; because they are sent generally with a view to the Universities and the learned professions; and earlier in life, therefore, their attention would be directed to subjects which are principally cultivated in schools of this description. In the next place, boys who are intended for the learned professions would stay longer at the school; and for that reason would be much better prepared to be candidates for the exhibitions. In the third place, it is obvious that in a town like *Manchester*, the

great majority of persons would send their sons to this school, with a view to their obtaining such general education as might fit them for being afterwards employed in trade, manufactures, and commerce, and without any idea of sending them to the Universities. No doubt a large proportion of the scholars enter the school without any such object. It is, therefore, clear that you cannot, at the first view, come to any conclusion whatever from the number of exhibitions given to boarders being greater in proportion than the number given to day scholars. . . . There are many persons who seem disposed to consider that, in a place like *Manchester*, the character of this school ought to be entirely changed, and that it ought to be devoted exclusively to commercial purposes. I should very much lament such a change, because the tendency of different pursuits is to form men into classes ; and it is, therefore, I think, of the utmost importance, for the purpose of obviating that great inconvenience, that we should, as far as possible, all of us be brought up according to one general system of education ; and no system of education is better for the purposes of refining and humanizing the manners of a nation than a system of literature founded upon classical learning. . . . There is another consideration, also, connected with these establishments, that they are the avenues by which the humbler classes, by industry, activity, and intelligence, can force their way into the highest situations of the state ; and, by furnishing the means of uniting at an early age the upper and lower classes, they tend to bind together by the strongest ties the whole system of society. For this reason I should regret any substantial change being made in the system upon which this institution is at present conducted."

2. NIGHTINGALE v. GOULBURN, 5 Hare, 484.

Legacy — Charity.

The testator in this case made a bequest in the following terms : — "I now desire that my trustees shall convert all my investments in the stocks, funds, and other securities into money, and shall pay such money, and all the trust moneys whatever remaining not disposed of after payment of all and every such legacies, donations, and sums of money aforesaid, unto the Queen's Chancellor of the Exchequer for the time being, and to be by him appropriated to the benefit and advantage of my beloved country, Great Britain." On inquiry, it appeared that this bequest embraced property savouring of the realty, as well as pure personalty. The question

was, whether this could be supported as a charitable bequest, or whether the property comprised in it was undisposed of, and distributable on that ground among the next of kin of the testator. The Crown contended for the validity of the bequest as a good charitable use within the statute of Elizabeth: and of that opinion was Vice-Chancellor Wigram *quoad* the pure personalty: but as to the property savouring of realty, his Honour declared the legacy void.

ATTORNEY GENERAL v. BOVILL, 1 Phill. 762

Poor — Charity.

The principle upon which the recipients of a charitable legacy to the poor of any particular place are to be selected seems to be still unsettled, notwithstanding the frequent decisions of the Court of Chancery upon the subject. In *Attorney General v. Wilkinson* (1 Beav. 370.), when this question was last discussed, Lord Langdale, M. R., did not conceive himself at liberty to treat it as an open question. So many cases had been argued and acquiesced in where the Court had decided that persons in the receipt of parochial relief were not entitled to the benefit of a charity intended for the poor, that his Lordship felt bound to follow the previous decisions. In some cases charity funds had been applied in aid of the poor rates, and virtually in relief of the parties liable to pay the rates. It certainly never was intended by such legacies to benefit the rich; and in order to prevent such a consequence, legacies of this kind have been always held by the Court to be applicable only to the poor who were not in the receipt of parochial relief. These decisions appear to be based on a sound principle. But some remarks of Lord Cottenham in the case before us, where a similar point was involved, seem to trench upon its authority, though his Lordship made no decision upon the point. Lord Cottenham, C.: "I am a good deal fettered by the decisions which have taken place with respect to persons receiving parochial relief not being proper objects [of the charitable bequest]. If I had not those decisions to contend with, it appears to me, with respect to this particular case, that the course would be to select proper objects of this charity, without regard to the question whether it would operate to the relief of the poor rates or not; for either directly or indirectly it must so operate, in whatever manner the funds may be applied. I am inclined to think that the right course is between the two that have been suggested; not to make the

poor rate the fund to receive, but to administer the charity, and to leave to chance to what extent it may operate to the relief of the poor rates."

4. *ROCKE v. ROCKE*, 9 Beav. 66.

Legacy — Payment.

The testator in this case bequeathed the residue of his property to his son Richard Hill, with the following proviso:—"But it is my especial desire that the residue of my property be not delivered over to him until the completion of his twenty-fifth year." Richard Hill having attained twenty-one, presented a petition for the payment of the residue which was then in Court. Lord Langdale, M. R.: "I will look at the terms of the will and see if the order can be made. If I should be satisfied that there is an absolute gift, with a direction to pay at twenty-five, then, as he has an absolute right at twenty-one, and can sell and mortgage his interest, I shall order the payment." On a subsequent day, his Lordship made an order accordingly for the immediate payment of the residue to the petitioner.

5. *EAST v. EAST*, 5 Hare, 343. 349.

Executor — Breach of Trust — Acquiescence.

It is a familiar doctrine and practice in Courts of Equity, that a breach of trust shall not go unredressed merely on account of the lapse of time since the commission of the fraud or irregularity, as the sanction of a defence founded merely on such a consideration would be a direct inducement to crafty concealment, and confer protection on the party by whose management the discovery of the fraud or impropriety had been most effectually prevented. On the other hand, Equity affords no assistance to parties who sleep upon their rights; and this appears by the case before us, in which an executor had received, among other assets of his testator, a promissory note for 400*l.*, and retained it in his possession for seven years, without enforcing payment either of the interest or the principal. At the end of those seven years, the residuary legatee, who had previously been an infant, attained his age of twenty-one years, whereupon the executor delivered to him the promissory note. Ten years after this the residuary legatee filed a bill against the executor, charging him with various breaches of trust in the course of his administration of the estate. Vice-

Chancellor Wigram, under these circumstances, held that such acquiescence had occurred on the part of the residuary legatee with regard to the promissory note that the Court ought not to charge the executor with the loss (which had happened) of the amount of the money thereby secured, or to give the residuary legatee any aid for that purpose by means of inquiries or otherwise.

6. *HALDENBY V. SPOFFORTH*, 9 Beav. 195.

Practice — Costs of Executor of defaulting trustee.

A suit having been instituted against the personal representative of a trustee for reparation of a breach of trust, a question arose whether the trustee's administrators were entitled to their costs as part of the expenses of the administration; and it was contended that the administrators were in the position of their intestate, the defaulting trustee, and could receive nothing until they had repaired the breach of trust. Lord Langdale, M. R., held that the administrators fairly acting were entitled to deduct their costs of suit out of the assets.

7. *BOWLES V. WEEKS*, 14 Sim. 591.

Practice — Appointment of Trustees by Court of Chancery.

A different rule of practice appears to prevail in the cases of charitable trusts and private trusts, where the deed or will creating the trust contains no power for the appointment of new trustees. In the present case a suit was instituted for the appointment of new trustees of a will, and the Court was asked to direct a power to appoint new trustees, on the happening of any future vacancy, to be inserted in the deed appointing the intended new trustees. But as the will in question contained no power for that purpose, the Vice-Chancellor of England refused the application, saying, that if he were to give the direction he might affect the interests of unborn parties. In a case of charitable trust, however, (12 Sim. 262.) his Honour directed such a power to be inserted in the deed appointing new trustees of the charity.

8. *SPOTTISWOODE V. CLARKE*, 1 C. P. Coop. t. Cott. 254.

Practice — Injunction — Copyright.

Although it is the general practice in Equity to restrain by ex parte injunction upon *prima facie* evidence the invasion of an

alleged copyright until the legal rights of the parties have been established—on the principle of preventing irremediable mischief or damage—yet as the mere suspense of the defendant's alleged legal right would in some cases be equivalent to the destruction of it, and so be productive of substantial injustice, the Court will, in such instances, abstain from exercising so important a power on an *ex parte* application, and will leave the parties to establish their rights in a Court of Law. The present case is an illustration of the rule in question, and is an example also of the care which the present Lord Chancellor always evinces to adapt the practice of the Court to the exigencies of modern society. The plaintiff and defendant were publishers of rival almanacs—a species of publication which enjoys only a temporary and very transient sale; and it is obvious that an *ex parte* injunction to restrain the defendant from selling his almanac until after a verdict at law should have been obtained for the establishment of the legal right, would have operated to the total destruction of the defendant's publication. On an application to the Vice-Chancellor of England, his Honour granted an injunction, and *ordered* the plaintiff to bring an action. On appeal to Lord Cottenham, his Lordship, notwithstanding the strong grounds which he himself pointed out for considering that a piracy had been committed by the defendant, dissolved the injunction, and gave the plaintiff *liberty* to bring an action. His Lordship accompanied this order with the following observations:—"In doubtful cases, of which this was one, it was the duty of the Court only to exercise its jurisdiction by injunction where the legal right of property had been ascertained. There were many reasons for that course being adopted. One reason was, that if the Court acted in ignorance of where the legal right lay, it might commit a great error in the exercise of this important jurisdiction. This was one reason why the Court was only justified in interposing by injunction in cases of this kind, where the legal right might be considered as in some degree certain. Another reason why the Court should not grant an injunction, and *order* the plaintiff to proceed at law, was that such an order compelled the parties to embark in future litigation, when it might be more discreet on their parts to pause and consider whether the matter should be followed up any further. When an order of the Court suspended the injunction, leaving the plaintiff merely at liberty to bring an action, it was very possible that there might be no further litigation. But it was different where the Court granted the injunction and ordered the plaintiff to bring an

action. In this last case the parties being at the moment both eager in support of their supposed rights, were much more likely to engage in litigation which might be useless. They could not escape from the order except by mutual consent. A further reason against the Court in doubtful cases — in cases where there was no sort of certainty — granting an injunction in the first instance, was, that the Court must be taken to express a strong opinion as to the legal right. For without such a strong opinion it must be assumed that the Court would not interfere. It must be manifest that the Court ought not in general to be considered as expressing a decided opinion on the subject of the legal right before the question had come before and been decided by the proper tribunal. Of all these reasons, however, that which furnished the greatest objection to an order granting the injunction, and making it incumbent upon the plaintiff to bring an action, was the first reason he had mentioned, that the Court might commit a great error, and so run the risk of doing the greatest injustice. He had frequently had occasion to dwell upon this point. Where the legal right was obviously such that no one could say on which side it lay, he always asked himself the question whether the Court did not run much greater risk of doing injury by continuing the injunction than it could do mischief by dissolving it? He always took into his consideration the extent of inconvenience on the one side and on the other side, as the injunction should be granted or withheld. On which side did the balance of harm preponderate? Now consider in the present case what the effect of the injunction must be. Here was a publication which, if it was not permitted to be issued to the public during the next month, would lose the greatest part of its value. An almanac for any year of course had its greatest sale at the commencement of that year and the end of the preceding year. If the sale of an almanac for any year was prohibited by an injunction till a legal question could be tried by an action in the beginning, or perhaps the middle, of the spring of that year, what would such an almanac be worth? Such an injunction would take the property away from the defendant and would give it to nobody. But suppose there was no injunction, and the sale should be left open till the right should be tried, the defendant would, it was true, in the mean time, be making a profit from the sale: and the plaintiff, if the result was in his favour, might be losing something of profit. But it must be recollected that the defendant would not be making a profit wholly for himself. If the question should be decided against him at law, he would be liable to come

to an account in this Court. Were, however, the injunction granted, the result would be, should the decision at law be in the defendant's favour, that the defendant would utterly lose what he was entitled to. The time for the sale and making a profit would be gone by. The injunction, therefore, would have committed a very great injustice. For this last reason, more especially, unless the case was such that the Court could have little doubt of the result of an action, it was its duty to abstain from exercising its jurisdiction by injunction till the right was established in due course of law. This was the rule upon which he had always acted, and he should continue to do so. Of course he spoke only of cases like that now before him. The rule was, however, not confined to the publication of such works as the present, although the mischief was obviously greater in such a case."

9. BROWN v. MARTYN, 2 Jones & Lat. 333.

Practice — Decree — Administration Suit.

It is within the daily experience of parties engaged in the practice of the Court of Chancery that much delay and expense might be saved if the Court were empowered to give its opinion upon the questions of construction which arise upon a will, without also insisting upon administering the assets conformably to such opinion. At present, however, the Court refuses to pronounce any judgment upon a controverted passage in a will until, by the means of previous accounts and inquiries before the Master, it is made to appear that there is a specific fund upon which the judgment of the Court can operate. Frequent attempts are made to induce learned judges to depart from this rule, but without success; and the case before us is an instance of this nature. The bill was filed to administer the assets of a testator, but principally to obtain a declaration of the Court that, under a particular passage in the will, the plaintiff was entitled to the testator's residuary personal estate; and upon the Lord Chancellor (Sir E. Sugden) intimating an opinion at the hearing that the cause was not ripe for a decision, his Lordship was requested by the counsel to decide the question at that time, as, on the announcement of the opinion of the Court, further proceedings would become unnecessary. Lord Chancellor Sugden: "This raises the abstract question whether the Court may make a declaration of right merely, without further administering the fund. Generally, the Court, when it makes a declaration of right, directs accounts or inquiries consequent

thereon. Here the plaintiff asks for a declaration, not as furnishing the principle upon which the accounts are to be directed, but in order to prevent the taking of any account. He desires to have a declaration from the Court that he is entitled absolutely to the residuary personal estate, subject to the payment of the debts and legacies, and then to be permitted to deal with the creditors and legatees out of court. It is against the course of the Court to do so."

III. POINTS IN THE LAW OF PROPERTY.

1. Vendor and Purchaser — Use and Occupation — Abortive Sale. 2. Lease — Best Rent. 3. Confirmation of Conveyance in Fee by Bankrupt Tenant in Tail.

1. WINTERBOTTOM V. INGHAM, 7 Q. B. 611.

Vendor and Purchaser — Use and Occupation — Abortive Sale.

A question of considerable importance, and likely to be of frequent occurrence, was involved in this case, *viz.* whether the purchaser of an estate, who enters into possession during the investigation of the title, is to be held liable to the vendor in an action for use and occupation, in the event of the contract becoming abortive through the vendor's failure in making out his title to the premises. In the present case an estate in Derbyshire was sold by auction in April, 1835, and by the conditions of sale the contract was to be completed on the 24th June, long before which day the purchaser was let into possession, in the expectation, entertained on both sides, that the vendor would show a good title. The title, however, was disputed; and the vendor's trustees, in whom the estate was vested, having filed a bill in equity to compel specific performance by the purchaser, the suit was eventually dismissed with costs. The trustees then brought an ejectment against the purchaser, but he soon after gave up possession. They then brought the present action for use and occupation, and the Lord C. J. Tindal, before whom the cause was tried, being of opinion that there was no contract either express or implied for any payment in respect of the defendant's occupation of the premises, the defendant had a verdict. The jury expressly found that the occupation, which had lasted *eight years*, was beneficial.

Leave was given to move to enter a verdict for the plaintiff for a fixed sum; but after a rule nisi had been granted and cause shown, the court of Queen's Bench eventually sustained the verdict for the defendant, the purchaser. Lord Denman, C. J.: "The defendant certainly was considered, both by himself and the plaintiff, as purchaser, not as tenant, and the plaintiff cannot convert him into an occupier, liable to pay for his occupation, by his own wrongful act in not completing the contract of sale. The jury have, indeed, found that the occupation was beneficial; but this statement is not without ambiguity. It may have been beneficial, supposing that he had actually become the owner, by making a fair return of profit on all his outlay; but it may also have been a very losing concern, on a balance struck between that outlay and the amount of the proceeds during the time of his actual holding. On the other hand he may have expended, as owner, in improvements, a sum much larger than a reasonable rent. How is this account to be taken, or this balance to be struck? A court of equity may have means for doing justice in this respect, between the parties, our courts have none. . . . Parties may easily secure themselves by stipulating for the event of a non completion of the purchase in the contract for sale and purchase."

2. DYAS V. CRUISE, 2 Jones & Lat. 460.

Lease — Best Rent.

The defendant and one Lynch were tenants in common of freehold property in Ireland, and upon the terms of a correspondence between the plaintiff, who was then in America, and Smyth, his agent in Ireland, the Court held that the agent was sufficiently empowered to let the lands at the *best rent*: upon this the present question arose whether the rent obtained was the best rent, a higher rent having been offered. We notice the case for the purpose of presenting the opinion of so eminent a property lawyer as the late Lord Chancellor of Ireland, upon this subject, which is of such great practical importance. Lord Chancellor Sugden: "It is said that in a letter from Mr. Smyth to Mr. Cruise, asking for authority to let the lands, he said he would endeavour, with the aid of Lynch and Galway, to set them to the best advantage; and his request being acceded to, it was argued that these words were equivalent to similar words in a power of attorney, and gave additional authority only to Mr. Smyth. Even without such words, I think an agent is bound to let the lands of his principal

to the best advantage ; and though I do not agree that the rent is to be weighed in the same scales whether a man is acting as owner or as agent, yet I agree that if this be not a contract for a lease at the best rent, it is not to be enforced. But I do not desire to be understood that, either in the case of a purchase or lease, upon the ground of mere undervalue, a *bonâ fide* letting or sale, which would be binding on the principal himself, will not be equally binding on him where he acts through his agent, if that agent has acted fairly and honestly. I could not do a more mischievous thing than to avoid a contract, *bonâ fide* entered into by an agent, because it is proved that the property was worth a shilling or two more rent than he obtained for it. I have examined the question of value with care, in order to show that what Mr. Dyas has given is fairly equal to the most that could have been obtained for the property ; but it is worth while to consider what is the law upon this point, and whether there is anything in the objection, even supposing that this was a case where a higher offer had been made. In *Doe v. Radcliffe*¹, the defendant claimed under a lease made by a tenant for life under a power to lease at the best rent. The rent reserved was 43*l.* per annum. It was proved that the tenant for life, before he made the lease, had two offers from other persons, one at 50*l.*, and the other at near 60*l.* a year ; it was therefore said, that 43*l.* was not the best rent. The jury found that it was a motion for a new trial having been made ; ‘the Court refused the rule, there being no pretence to impeach the lease on the ground that the letting at 43*l.* a year was not done *bonâ fide* by the tenant for life at the time, he not having taken any fine or other consideration for the lease, and having a manifest desire to get the best rent, which, under all the circumstances, and due consideration of the ability and good management of the tenant, could reasonably be obtained. And they said that, where the transaction was fair, and no fine or other collateral consideration was taken by the tenant for life leasing under the power, or injurious partiality manifestly shown by him in favour of the particular lessee, there ought to be something extravagantly wrong in the bargain in order to set it aside on this ground ; for in the choice of a tenant there were many things to be regarded besides the mere amount of the rent offered.’ I ask is there anything extravagantly wrong in this bargain, which would call on me to withhold the aid of the Court to enforce the contract ? In the case of the *Queensberry leases*²,

¹ 10 East. 278.

² Cited 2 Sugd. on Powers, 423.

Lord Eldon said, 'There is but one criterion which our courts always attend to as the leading criterion in discussing the question whether the best rent has been got or not; that is, whether the man who makes the lease has got as much for others as he had got for himself; for if he has got more for himself than for others, that is decisive evidence against him. The Court must see that there is reasonable care and diligence exerted to get such rent as, care and diligence being exerted, circumstances mark out as the rent likely to be obtained.' These authorities are conclusive as regards this question."

3. *Ex parte FRIPP, Re PHELPS, 1 De Gex, 300.*

Confirmation of Conveyance in Fee by Bankrupt Tenant in Tail.

Under the will of one Charles Nicholls, the bankrupt took an estate which he had sold and conveyed as an estate in fee; and it was quite clear that he took under the devise in question, either an estate in tail or an estate in fee. The purchaser was advised that the estate was in fee, and completed his contract accordingly. On a re-sale, however, it was objected by the new purchaser that the bankrupt had only an estate tail, and that the entail had not been barred. The original purchaser thereupon petitioned the Court, that the Commissioner, who was willing to act under the direction of the Court of Review, might execute a deed of confirmation of the original conveyance by the bankrupt; and upon proof of the facts the Court ordered that the Commissioner should be at liberty to execute the deed of confirmation, and that the assignees should convey, the petitioner paying all the costs.

IV. POINTS IN BANKRUPTCY.

1. Jurisdiction of Court of Review — Appointment of new Trustees. 2. Solicitor to Fiat — Liberty to purchase Bankrupt's Estate. 3. Practice — Staying Dividend — Proof. 4. Parol — Conversion of separate into joint Debt — Statute of Frauds.

1. *Ex parte CONGREVE, Re OLIVER, 1 De Gex, 267.*

Bankruptcy — Jurisdiction — Appointment of new Trustees.

On a petition for the appointment of new trustees in the room of the bankrupt, it was suggested to the Court, that under a par-

ticular construction of the will, of which the bankrupt was a trustee, certain individuals who had not been served with notice of the petition, might be considered interested in the trust-property. Knight Bruce, C. J., thereupon said, it was never intended that this Court should decide, in any case of doubt, who were the *cestuis que trust*; and his Honour, therefore, ordered the petition to stand over, with liberty to serve the parties in question.

2. Ex parte WATTS, Re SEDGWICK, 1 De Gex, 265.

Solicitor to Fiat — Purchase of Bankrupt's Estate.

In this case, an estate of the bankrupt at Hythe, in Kent, encumbered to the amount of 884*l.*, and subject to the costs of a foreclosure suit, and a lien for 40*l.*, was put up to auction, but no bidding was obtained. The property had been valued at 800*l.*, and under these circumstances the solicitor to the fiat offered to give 10*l.* for the equity of redemption, and to pay off the incumbrances; and he petitioned for liberty to become the purchaser, the assignees being about to put the property up for sale again. The assignees by their counsel declared their opinion that it would be beneficial to accept the solicitor's offer without the expense of a second action: whereupon the Chief Judge said, that as this was the opinion of the assignees, he saw no necessity for a sale by auction, and made the order as prayed by the solicitor.

3. Ex parte STURTON and others, Re PULVERTOFT, 1 De Gex, 341.

Practice — Staying Dividend — Proof.

In this case a special application was made by joint creditors under a bond, for leave to prove their claim, and for the stay of a dividend which had been declared. The petitioners had omitted their proof for eleven years since the issuing of the fiat; but as the first dividend was not declared until ten years from that time, the Chief Judge granted the order.

4. Ex parte LANE, Re LENDON and LENDON, 1 De Gex, 300.

Conversion of separate into joint Debt by Parol — Statute of Frauds.

The bankrupts in this case were father and son, and the question before the Court was, whether a debt originally due to the petitioner from the father alone had been converted into a joint

debt of the two. The evidence was, that at the formation of the partnership all parties considered that the firm became liable to pay the debts; that one of the bankrupts had so declared to the creditors who assented to the arrangement; and that the subsequent transactions between the creditors and the firm proceeded on that footing. The Commissioner had rejected the proof against the joint estate, and on appeal to the Court of Review, it was contended, that evidence of a mere parol agreement to convert the debt was insufficient, the agreement being to charge a person upon a special promise to pay the debt of another, and that the agreement ought to have been in writing to satisfy the Statute of Frauds. Knight Bruce, C. J.: "If A. be a creditor of B., and B. and C. purpose to enter into, or have entered into partnership, and say to A., 'we wish this debt to be a debt from us both, and we will pay it;' and A. accedes to that, although there is no writing, the agreement is valid and effectual, and is not impeached or affected by the Statute of Frauds. The effect of such an agreement is to extinguish the first debt, and for a valuable consideration to substitute the second debt. These very words need not be used by the parties, if there is sufficient to show that the intention was so; that will be as effectual as if the most formal expression had been given to the intention. . . . There is sufficient evidence to convince my mind, that it was in effect agreed between the three that the separate debt of the father should become the joint debt of the father and son." Proof admitted.

LIST OF CASES.

Att. Gen. *v.* Bovill, 433.
 Att. Gen. *v.* Earl of Stamford, 430.
 Bird *v.* Jones, 417.
 Bowles *v.* Weeks, 435.
 Brown *v.* Martin, 438.
 Chantler *v.* Lindsay, 428.
 Cocks *v.* Purday, 427.
 Congreve, *Ex parte*, 442.
 Dyas *v.* Cruise, 440.
 East *v.* East, 434.
 Tripp, *Ex parte*, 442.
 Gosling *v.* Veley, 421.
 Haldenby *v.* Spofforth, 435.
 Hall *v.* Storey, 427.
 Hill *v.* Kitching, 426.

Knight *v.* Barber, 419.
 Lane, *Ex parte*, 435.
 Morris *v.* Manesty, 425.
 Newton *v.* Grand Junction Railway
 Company, 425.
 Nightingale *v.* Goulburn, 432.
 Parkhurst *v.* Gosden, 427.
 Locke *v.* Locke, 434.
 Spottiswoode *v.* Clarke, 435.
 Sturton, *Ex parte*, 443.
 Taylor *v.* Stendall, 428.
 Watts, *Ex parte*, 443.
 Winterbottom *v.* Ingham, 439.
 Wontner *v.* Shairp, 420.
 Wright *v.* Burroughs, 429.

POSTSCRIPT.

THE Criminal Law Commissioners have made their Third Report, and it becomes necessary to explain how the labours of this Commission now stand. The Commission for revising the Digests of Crime and Punishments, and of Procedure prepared by the former Commissioners, was issued on the 22d of February, 1845. The Commissioners were, Sir E. Ryan, Mr. Starkie, Mr. V. Richards, Mr. Ker, and Mr. Amos. In addition to revising the Digests, Mr. Starkie and Mr. Ker were specially authorised by the same Commission to complete the Digest of Procedure (then only finished in part), previously to its being revised by the whole body of Commissioners; and the Commissioners were also directed to report *separately* on such enactments as in their opinion ought to be expunged from the Statute Book. Under this last branch of their authority the Commissioners made a very elaborate Report on Penalties and Disabilities in regard to Religious Opinions, and prepared the Bill, a part of which afterwards became law, for carrying into effect the recommendation contained in that Report. Messrs. Starkie and Ker also completed the Digest of Procedure, a work of very great labour. In the mean time the work of revision was going on, and the Commissioners, before the expiration of the year from the issuing of the Commission, presented a Report on Homicide and other Offences against the Person, and on the following general matters, viz.: Incapacity to commit Crimes and Duress; Wilful, Malicious, Negligent, and Accidental Injuries; and Criminal Agency and Participation. Shortly after the presentation of this Report Mr. Richards died, and subsequently Sir E. Ryan was made a Railway Commissioner, and tendered his resignation as a Criminal Law Commissioner; but at the instance of the Lord Chancellor and Sir George Grey, consented to remain upon the Commission until the Report, which has just been made, was completed. Sir E. Ryan, however, finding he was able to give very little, in fact next to no attention, to the work of revision, in April again informed the Chancellor of his wish to retire from the Commission; but it was not till the beginning of June that the remaining Commissioners were directed by Sir George Grey to proceed to make the Report without him, which they accordingly did on the 10th June last. But for the delay occasioned by these circumstances, much greater progress would, in all probability, have been made in the revision. The Report contains, nevertheless, a goodly array of subjects; and it is confidently expected that the remaining chapters of the Digest, viz.: Treason and other Offences against the State; Offences against Religion and the Established Church; Offences against the Executive Power generally, and against the administration of Justice; Offences against the Public Peace; Offences against Public Health; Common Nuisances; Libel and Illegal Solicitations; Conspiracies, Attempts, and Repetition of Offences,—will be revised, and the whole Digest put into the form of a Bill, ready for legislation in the course of next Session. There will then only remain the Digest of Procedure to be revised, in which no doubt it will be found necessary to introduce many great alterations. We may now, therefore, reasonably look forward to the completion

of this great work — the commencement, as we hope and believe, of a general Digest of the whole Statute and Common Law. We rejoice in this, as we have repeatedly declared it to be the bounden duty of all Governments to tell their subjects plainly by what laws they are to guide their conduct.

A Commission to consider the Law of Marriage has been appointed. The Commissioners are the Right Honourables J. Stuart Wortley, Dr. Lushington, and A. R. Blake, Mr. Justice Vaughan Williams, and the Lord Advocate of Scotland, and they are "to inquire into the state and operation of the Law of Marriage as relating to the prohibited degrees of affinity, and to marriages solemnised abroad or in the British Colonies." The Secretary to the Commissioners is Mr. Herman Merivale. The subjects to be considered by this Commission have already occupied much of our attention, 2 L. R. 136., and *ante*, p. 99.

The Registration and Conveyancing Commission is now proceeding to take evidence, and we believe that several gentlemen have been examined by the Commissioners. A copy of this Commission was moved for by Lord Brougham on the last day of the Session.

Legal Education has made some progress in the last quarter. The Society of Gray's Inn has appointed Mr. W. D. Lewis Lecturer on Conveyancing; and the Society of the Inner Temple has appointed Mr. R. Hall Lecturer on Common Law; and the Society of Lincoln's Inn has at length made the following announcement: —

"Resolved, — that the Professor of Equitable Jurisprudence, as administered in the Court of Chancery, be appointed by the majority of the Benchers, at a Salary from the Society of 300*l.* per annum, and fees from the students of one guinea annually from each student attending the lectures; and that the first appointment of the Professor be for one year."

"Resolved, — that the election of the Professor do take place on the Second day of Michaelmas Term next; and that notice of these resolutions be communicated to the Benchers of the other Inns of Court."

If these Societies had made these appointments a year ago (which they might well have done), the profession would have been perfectly satisfied: as it is, we doubt whether they must not now do something more.

Lord Brougham has again brought before the House of Lords the whole state of the Private Business in Parliament, and ended by moving the resolutions on this subject which were printed in this work a year ago, 4 L. R. 274. This subject is familiar to our readers, but it was treated by Lord Brougham with all that power, originality, and variety of illustration which peculiarly distinguish his Lordship's speeches. The speech made a great impression both in and out of Parliament, and we cannot doubt that this will be one of the first subjects as to which both Lords and Commons will be called on to direct their attention in the next Session.

We are happy to find that the views which we brought before our readers on the subject of Transportation and Secondary Punishments were very generally recognised as correct in the ensuing debates on those important subjects. The result of those debates was that the Prison Bill, under which the most important of the changes were to be made, was abandoned, and specific legislation on the subject is to be brought forward next Session. We need not say that on this difficult question all party feelings must be carefully excluded; but after

the opinion of the Judges on this point, to which we adverted in our last Number, added to those of all constitutional writers, we cannot too strongly object to any wholesale alteration of the sentence passed by the Judge, or any attempt to set aside the Statute Law by a constant resort to prerogative. We believe, however, that the present Government are now fully sensible of the justice of these remarks.

The Bill relating to Irish Incumbered Estates has been abandoned. Without the alterations which we ventured to suggest (*antè*, p. 165. 167.), we are satisfied that it would have been a measure of doubtful if not dangerous policy; and we are glad, therefore, that it has been withdrawn. Still, the necessity for legislation remains, and will press on the Government more closely than ever when the new Irish Poor Law Act comes into operation; and then those great questions relating to the transfer of property, which stand ready for decision, must be forced on the public mind. We are very glad to find that the Lord Chancellor has commenced a reform in Chancery. He has abolished by one act a mastership in Chancery (10 & 11 Vict. c. 60.; see *antè*, p. 142.), by another he has dispensed with the necessity of the masters' attendance in the public office (10 & 11 Vict. c. 97.; see *antè*, p. 129.). His Lordship had also brought in two useful Bills relating to Trustees, one of which has passed (10 & 11 Vict. c. 96.), enabling trustees to pay money into the Court of Chancery, and thus gain a sufficient discharge; the other,—which has been postponed,—for regulating charitable trustees. We highly approve of all these measures; but we are quite satisfied that the necessary reform must extend much deeper. We have already afforded our readers some opportunity of judging for themselves as to this, and we shall continue to do so. We have seen in this Number that the State of New York has just abolished *her* Court of Chancery in the summary manner possible in a Republic (see *antè*, p. 333.); and nothing but a timely and searching reform can save it in this country. This may be a bold statement, but it is sometimes necessary to speak the naked truth. In the mean time, the Bankruptcy Appellate Jurisdiction has been restored to the Court of Chancery, not without considerable opposition. By the same act (10 & 11 Vict. c. 102.), the insolvency jurisdiction lately given to the Bankrupt Commissioners has been added to the Insolvent Commissioners, who are relieved from their circuits. The County Court Judges are in future to attend to this branch of insolvency. Mr. Ayrton has been appointed to the commissionership vacant by the resignation of Mr. Burge. And now we wish a pleasant vacation to all our readers.

July 26. 1847.

BOOKS RECEIVED DURING THE LAST QUARTER.

Acta Cancellariæ, or Selections from the Records of the Court of Chancery.
By Cecil Monro, one of the Registrars of the Court. Benning and Co. 1847.

[A Notice of this work will be given in our next Number.]

A Treatise on the Pleadings in Suit in the Court of Chancery. By Lord Redesdale. 5th Edition, with additional Notes by Josiah W. Smith, B. C. L., Barrister. Stevens and Norton, 1847.

Essays on Human Rights and their Political Guarantees. By C. P. Harblut, Counsellor at Law in the City of New York; with Preface and Notes by George Combe. Edinburgh, Macklachlan and Stewart, 1847.

The Modern Orator; being a Collection of celebrated Speeches of the most distinguished Orators of the United Kingdom. Speeches of Lord Erskine, Aylott and Jones, 1847.

The Legal Practitioner; a Solicitor's Monthly Journal, No. IV.

Suggestions for altering the Laws of Real Property and the System of Conveyancing. By a Barrister. Stevens and Norton, 1847. —

The Foundation Statutes of Merton College, Oxford. Edited by Edward France Percival, M. A. of Brasenose College, Oxford. 1847. Pickering.

The Repertory of the Inrolments on the Patent Rolls of Chancery in Ireland, commencing from the Reign of King James I. Edited by John Caillard Beck, LL.D. Vol. I. Part I. 1846. Dublin.

Letter to Lord Lyndhurst from Lord Brougham on Criminal Police and National Education. Ridgway, 1847.

A Treatise on the Law of Contracts, Rights, and Liabilities of Contractors, by C. G. Addison, Esq., Barrister. W. Benning and Co. 1847.

Clinical Facts, Reflections, and Remarks on the impunity of murder in some Cases of presumed insanity. By Thomas Mayo, M.D. F.R.S. Longman and Co. 1847.

Cicero; a Drama. By the Author of "Modern State Trials." Simpkin and Marshall. 1847.

Manual of the Law of Scotland. By John Hill Burton, Advocate. 2d Edition. Oliver and Boyd. 1847.

Remarks on the Practice of the Masters' Offices. By Mortimer Mortmain. 1847.

INDEX

TO

THE SIXTH VOLUME.

A.

Affidavit. *See* Oaths.

Arrest on mesne process, 149 — Public meetings of merchants and traders in London, 149 — Resolutions passed, 150 — Honest debtors, 151 — Proposal for the protection of honest debtors, 153 — Dishonest debtors, 156 — Defects of the old system of arrest, 158 — Efficacy of imprisonment, 160.

Attorney. *See* Solicitor.

B.

Bar, the. *See* Legal Education.

Brougham, Lord, letter from to Lord Lyndhurst on criminal law reform. *See* Transportation.

C.

Chancery Reform — The Masters' Office, 122. 308 — Chancery Commission in 1840, 123 — Speeches of Lords Campbell and Lyndhurst on the Charitable Trusts Bill, 125 — Delay and expense of proceedings, 126 — Plans for improving the Masters' office, 128 — Suggestions of Mr. Pemberton Leigh, 127-137 — Of Mr. Senior, 128 — Of the Law Amendment Society, 131-137 — Suggested transfer of the Masters' duties to other judicial persons, 132 — Suggestions of Mr. Fane, 135 — Addition to the number of judges suggested, 139 — Report of the Law Amendment Society as to improving the mode of proceeding in the Masters' offices, 308 — Causes of delay in prosecuting inquiries, 309 — Suggested amendments, 310 — Importance of continuity of proceeding, 312. — Defects of the Court of Chancery, 315 — Judicial and administrative duties of the

Court, 318 — Inconvenient distribution of judicial labour between a Vice-Chancellor and a Master, 319 — Insufficient jurisdiction of the Masters, 320 — Present system productive of appeals, 322 — Unnecessary references to the Master, 324 — Judicial duties of the Master should be performed by the judge, 326 — Proposed distribution of the administrative duties of the Court, 326 — Plan for carrying into effect the proposed changes, 327-331 — Re-organization of the judicial establishment of the State of New York, 333. *n.*

Colonial Judgeships, 300 — Report of Law Amendment Society on, *ib.* — Mode of appointment, 301 — Importance of the judge to the colony, 302 — Salaries of judges, 303 — Tenure of office, 304 — Functions of the judge, 305 — Removal from office, 306 — Pensions, 307.

Common law, appointment of lecturer on, by the Inner Temple, 446.

Conflict of laws, or private international laws, writers on, 56 — Different opinions on the "Comitas Gentium," 58 — Commentaries on Montesquieu, 60 — Dr. Felix, 63 — M. de Savigny, 65 — Mr. Justice Storey, 66.

Conveyancing, appointment of lecturer on, by Gray's Inn, 446.

Counsel. *See* County Courts Act.

County Courts Act, new, 168 — Old county courts, 169 — Provisions of the new act, 170 — Jurisdiction of the new courts, 174 — Evidence of parties interested, 176 — Attendance of counsel and attorneys, *ib.* — Rules for regulating the practice and proceedings of the courts, 178.

Courts of justice, administration of oaths in, 265.

Criminal law commissioners, report of, 445.

Criminal law reform. *See* Transportation.

D.

Debtor and Creditor. *See* Arrest on *Mesne Process*.

Declaration, substitution of, for oaths, 265. *See* Oaths.

Dunning, Memoir of, 83 — His birth, and education, *ib.* — Appointed Solicitor General, 84 — Chancellor of the duchy of Lancaster for life, *ib.* — His career in Parliament, and speeches, 85 — His attacks on Lord Mansfield, 86 — His fame in Westminster Hall, 87 — His marriage, 88 — Burke's Eulogy of Dunning, 89 — His letters, 90.

E.

Estates, law of — Curtesy of England, 33 — What it is, 33-36 — How held and enjoyed, and in what estates it exists, 37-41 — Estate tail after possibility of issue extinct, what it is, 42 — How held and enjoyed, 43 — Estate for years, 249 — What it is, 251-253 — How it may be acquired, 254-257 — How held or enjoyed, 258 — How assigned or lost, 260.

Elections, controverted, 376 — Assumed jurisdiction of the House of Commons, *ib.* — Favoured by the Crown, 377 — State of the franchise in the reign of Henry VIII., 382. — Sir Robert Peel's Act, 385.

Equitable Jurisprudence, professorship of, at Lincoln's Inn, 446.

Equity. *See* Chancery Reform.

F.

Fane, Mr. Commissioner, letter of, to Lord Cottenham, 135.

France, judicial abuses in, 143 — Mixture of political and judicial functions, *ib.* — Court of Cassation, 144 — Interference of judges in elections, 146.

French judicial proceedings, trial of ministers before the Chamber of Peers, 389 — Irregular mode of accusation, 390 — Reception of improper evidence, 391.

G.

Gaol Chaplain, experiences of a, 282 — A game law offender, 288 —

Trial by jury, 289 — Opinion on punishments, 291 — The tread-mill, 292.

H.

House of Commons, Committee on Legal Education, 225 — report, 226 — Committee on the Law of Settlement, 335 — taxation of costs of private business, 222 — *See* controverted Elections.

House of Lords, Committee of, on Oaths, 265-277.

I.

Imprisonment. *See* Arrest — Transportation.

India, alterations in Equity procedure in, 141.

Inns of Court. *See* Legal Education. International Law. *See* Conflict of Laws.

Ireland, the Lord Chancellor's Bill to facilitate the sale of incumbered estates in, 165 — Objections to the Bill, 166.

J.

Judge, recollections of a deceased Welsh, 46-243 — the York and Clarke session of Parliament, inquiry into the conduct of the Duke of York, 46 — loose character of the evidence received, 49 — Ferguson, 243 — wit of the Irish bar and bench, 244 — Plunkett, 246 — Grat-tan, 248.

Judicial abuses in France, 143.

L.

Legal education, 225 — Mr. Wyse's Committee on, *ib.* — preparation for the bar in England and Ireland, 226 — in Scotland, 228 — state of the Inns of Court, *ib.* — appeal from the decision of the benchers, 232 — election of benchers, 233 — appointment of professors in the Inns of Court, 235 — necessity for a Law University, 236 — rights and privileges of the Inns of Court, 237 — education of attorneys and solicitors, 238 — resolutions of the Legal Education Committee of the Law

Amendment Society, 240 — appointment of lecturers on conveyancing by Gray's Inn, and on common law by the Inner Temple, and professorship of equitable jurisprudence at Lincoln's Inn, 446.

Levitical law, what marriages prohibited by the, 118.

Lynch, Master, resignation of, 142.

M.

Marriage with a deceased wife's sister, 99 — Decisions as to its invalidity, 101 — Lord Lyndhurst's Marriage Act, 102 — Prohibited degrees of consanguinity or affinity, 103 — Prohibitions by Common Law, 105 — Statutes as to marriage, 107 — 116 — Review of the statutes, *ib.* — Prohibitions by the Levitical law, 118 — Decision in *Hill v. Good*, 120.

Marriage, appointment of Commission to consider the law of, 446.

Masters' office. *See* Chancery Reform.

O.

Oaths, on the administration of, in Courts of Justice, 265 — Committee of the House of Lords, 265 — 277 — Mr. Tyler's treatise on oaths, 266 — Meaning and obligation of an oath, *ib.* — Its tendency to immorality and superstition, 267 — What ought to be the form of an oath, 269 — Present system of administering oaths, 272 — Objections to the present system, 273 — Erroneous notions of the nature of an oath, 274 — Form employed, 276 — Levity and indecency with which oaths are administered, 277 — Amendments suggested, 278.

O'Connell, Mr. memoir of, 370 — His success as an advocate, 371 — Made a King's counsel, 373 — His withdrawal from practice, *ib.* — His efforts for Catholic emancipation, 374 — As a political leader, 375 — Offered the Mastership of the Rolls, 376.

P.

Pilgrim's Progress, the new, 74 — 293 — Constituted authority — Govern-

ment, 75 — Lady Common Law, 80 — Madame Equity, 81 — Feudality, 82, 294.

Poor laws. *See* Settlement.

Private bills, new regulations of the House of Commons as to committees on, 222.

Prussia, new constitution of, 219.

R.

Real Property commission, the new, 163 — Registration of deeds, and simplification of forms of conveyance, 164 — Importance of simplifying titles, *ib.*

Recollections. *See* Judge.

S.

Secondary punishment. *See* Transportation.

Senior Master, facts and suggestions respecting the Master's office, 122.

Settlement, the law of, 335 — Early provision for the poor, 336 — Early statutes as to settlement, 337 — Alteration in the law of settlement by the new Poor Law act, 343 — Different kinds of settlement, 345 — Disadvantages of the law, 350 — Prejudicial to labour, 352 — Alteration of the law by 9 & 10 Vict. c. 66., 353 — Objections to the new law, 354 — Evidence taken by the select committee of the House of Commons on the law of settlement, 355 — Abolition of settlement and removal considered, 356 — Unequal distribution of pauperism, 357 — Scheme of national rate considered, 358 — Pauperism in the United States, 359 — State relief, *ib.* — Union chargeability and rating, 360 — 367 — Pauperism on the Continent, 364 — Residential settlement, 368.

Society for promoting the amendment of the law, resolutions of, as to legal education, 240 — Reports and papers of, as to removal of colonial judges, 300 — As to improving the mode of proceeding in the Masters' offices, 131. 137. 308. 315 — Proceedings of, 181. 404 — Fourth annual report of, 404.

Solicitors, grievances of, 392 — Duties performed by attorneys and solicitors, 393 — Taxes on justice in the shape of fees, 395 — Exclu-

sion of attorneys from offices of honourable distinction, 397 — Exclusive regulations of inns of court, 398 — Right of attorneys to act as advocates, 399 — Certificated conveyancers, 400 — Parliamentary agents, 401 — Stamp duty on attorneys' certificates, *ib.* — Solicitors' fees and emoluments, 402 — Inconvenient situation of the Courts of Westminster, *ib.*

T.

Transportation, secondary punishments, 1 — The new scheme of the government, 2 — Its unconstitutional and illegal character, 3 — The judges opposed to it, 6 — Objections to transportation, *ib.* — Reformation of criminals, 10 — Lord Brougham's letter to Lord Lyndhurst, 11 — Reformatory establishment for criminals in England and on the Continent, 15 — Evidence

taken before Lord Brougham's committee on the execution of the criminal law, 16 — As to abolition of transportation, 17-22 — As to a reformatory system of prison discipline, 23-28 — Liberated convicts in France, 29 — Report of the committee of the legislative council of New South Wales, on the renewal of transportation, 31 — Opinion of the judges on transportation, and secondary punishments, 216.

Tithes, formerly liable for the maintenance of the poor, 336.

Titles, simplification of, 164.

Tyler's, Mr., treatise on oaths, 266.

U.

United States, reorganization of the judicial establishment in the state of New York, 333. *n.*

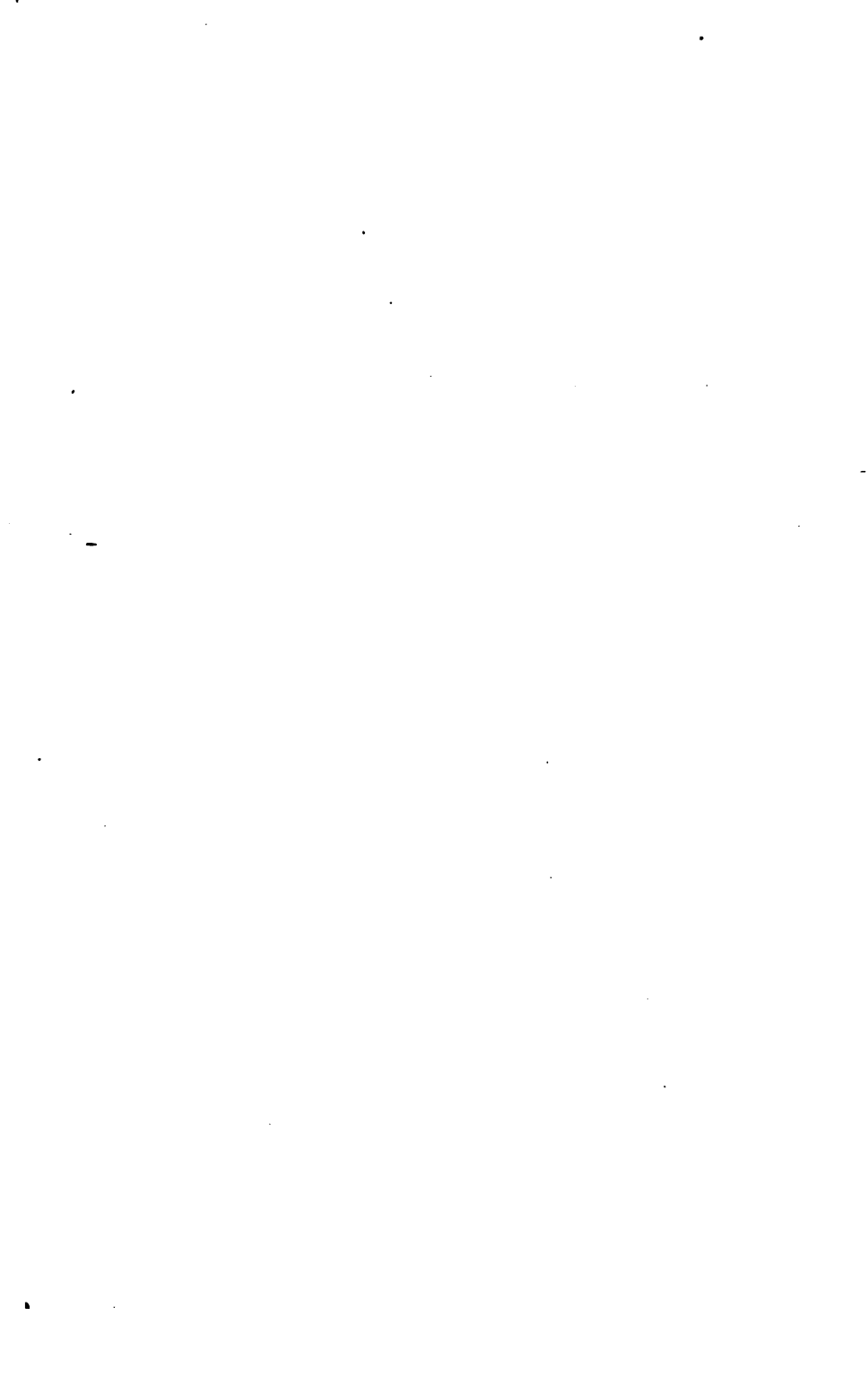
—— state relief to paupers in, 359.

University, Law. *See* Legal Education.

END OF THE SIXTH VOLUME.

LONDON:

SPOTTISWOODE and SHAW,
New-street-Square.



Stanford Law Library



3 6105 062 731 729



